



# Department of Justice

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STATEMENT

OF

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BEFORE THE

COMMITTEE ON THE JUDICIARY  
U.S. HOUSE OF REPRESENTATIVES

CONCERNING

"H.R. 2102, the "FREE FLOW OF INFORMATION ACT OF 2007"

PRESENTED ON

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**Statement of**  
**Rachel L. Brand**  
**Assistant Attorney General, Office of Legal Policy**  
**United States Department of Justice**  
**Before the**  
**Committee on the Judiciary**  
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**Concerning**  
**“The Free Flow of Information Act of 2007”**  
**Presented on**  
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Mr. Chairman, Ranking Member Smith, and Members of the Committee, thank you for the opportunity to testify before you today. This hearing addresses the sometimes difficult intersection of one of the government’s most fundamental obligations – providing for the safety of the people by investigating, prosecuting, and deterring criminal activity – and two of our most cherished constitutional rights – the freedoms of speech and press protected by the First Amendment.

My testimony today will cover three general topics. First, I will explain the Department’s longstanding commitment to striking a balance between the public’s interest in the free dissemination of ideas and information and the public’s interest in effective law enforcement and the fair administration of justice. Second, I will provide the Department’s views of the law in this area as it currently stands. Third, and finally, I will argue that the protections currently provided by the law and by the Department’s own internal policies have been and continue to be effective in striking an appropriate balance between these two important interests, and that the proposal pending before this committee – H.R. 2102, “The Free Flow of Information Act” – would upset that balance, with serious and harmful affects.

**I. The Department’s Policy Reflects an Appropriate Balance**

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 this, the Department has, for over 35 years, provided guidance to its prosecutors that limits the circumstances in which they may issue subpoenas to members of the press.

The guidelines – codified at 28 C.F.R. § 50.10 and reiterated in the United States Attorney’s Manual – demonstrate how seriously the Department takes any investigative or prosecutorial decision that implicates, directly or indirectly, members of the news media. This policy seeks to “balanc[e] the concern that the Department of Justice has for the work of the news media and the Department’s obligation to the fair administration of justice.” 28 C.F.R. § 50.10(a).

Specifically, 28 C.F.R. § 50.10 requires that the Attorney General personally approve all contested subpoenas directed to journalists, following a rigorous and multi-layered internal review process involving numerous components of the Department. Only after “all reasonable attempts” have been made to obtain information from alternative sources and negotiations for voluntary production have failed may a prosecutor seek permission to issue a subpoena to the media. *Id.* § 50.10(b) Even then the prosecutor may do so only if there are “reasonable grounds to believe, based on information obtained from nonmedia sources, that a crime has occurred, and that the information sought is essential to a successful investigation – particularly with reference to directly establishing guilt or innocence.” *Id.*

Ordinarily, this requires the prosecutor to write a detailed memorandum setting forth the justification for the subpoena and establishing the prosecutor’s compliance with the guidelines. The memorandum is then reviewed by the Criminal Division’s Office of Enforcement Operations, the Assistant Attorney General responsible for the investigation, the Office of the Deputy Attorney General, and, ultimately, the Attorney General.

The exhaustiveness and rigor of this process is no accident: it is designed to deter prosecutors from 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. The fact is that the Department issues subpoenas to the media very rarely. Since 1991, the Department has approved the issuance of subpoenas to reporters seeking confidential source information in only 19 cases. 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.

The Department does not believe a case has been made that the availability of subpoenas to the media, given how rarely and judiciously they have been used, has restricted the freedom of the press or the free flow of information to the public. Things were much the same in 1972 when the Supreme Court noted in Branzburg v. Hayes that “the evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior common-law and constitutional rule regarding the testimonial obligations of newsmen. Estimates of the inhibiting effect of such subpoenas on the willingness of informants to make

disclosures to newsmen are widely divergent and to a great extent speculative.” 408 U.S. 665, 693-94 (1972).

## **II. There Is No Exemption for Journalists from the General Obligation to Abide by the Law**

The Justice Department’s policy provides greater protections for journalists and the newsgathering process than the governing law requires. Neither the Constitution nor the common law provide an exception for journalists from the general obligation of all citizens to obey the law – whether it be the law governing unauthorized disclosure of classified information or what the Supreme Court has called “the longstanding principle” that the grand jury has a right to every man’s evidence.

As the members of this Committee are well aware, the intersection of the law and the media’s newsgathering function has received heightened attention in recent years as a result of serious leaks of classified information to the press. As President Bush has said, such leaks have threatened our national security, damaged our ability to pursue terrorists, and put our citizens and armed forces at risk. Then-CIA Director Porter Goss stated last year that leaks have alerted our enemies to intelligence collection technologies and operational tactics, and that it has “cost America millions of dollars” to repair the damage. These concerns have been echoed by Members of Congress in both the House and the Senate, including some Members of this Committee.

Nevertheless, it is a reflection of the Department’s abiding respect for First Amendment principles and the vital role played by the press in our free society that the Department has never in its history prosecuted a member of the press under any of the several statutory provisions that prohibit the unauthorized disclosure of certain categories of classified information – even though such a prosecution is possible under the law. The Attorney General has repeatedly stated that the Department’s primary focus is on the leakers of classified information, and not the media recipients of those leaks. It is the Department’s strong preference to work with the press to prevent the dangerous revelation of classified information.

Just as courts have recognized that the laws forbidding unauthorized disclosure of classified information fail to provide an exemption for any particular profession or class of person, including journalists, so, too, have federal courts declined to recognize a “reporter’s privilege” to withhold information from a grand jury conducting a good faith investigation. The Supreme Court made clear why this is so in Branzburg v. Hayes. In that case, the Court noted that “[f]air and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process.” Branzburg, 408 U.S. at 690. This “fundamental function of government,” the Court held, outweighed “the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or trial.” Id. at 690-91.

Branzburg has been followed consistently by the federal courts of appeals, including two recent decisions involving media subpoenas in the United States Courts of Appeals for the District of Columbia and the Second Circuit. In refusing to recognize the existence of such a “reporter’s privilege,” courts have relied not only on the importance of the governmental interest in “fair and effective law enforcement,” but also on what the Supreme Court in Branzburg called the “practical and conceptual difficulties” that administering such a privilege would present.

The Branzburg Court noted, among other potential problems, (1) the difficulty of “defin[ing] those categories of newsmen who qualified for the privilege”; (2) the danger that “[s]uch a privilege might be claimed by groups that set up newspapers in order to engage in criminal activity and therefore be insulated from grand jury inquiry, regardless of Fifth Amendment grants of immunity”; and (3) the danger that “courts would be inextricably involved in distinguishing between the value of enforcing different criminal laws.” Id. at 703-4.

The potential practical and conceptual difficulties identified by the Court in Branzburg would obtain regardless of whether the asserted “reporter’s privilege” was constitutional or statutory in nature. And those difficulties only multiply when one considers how a reporter’s privilege would operate in the context of the ongoing effort to investigate, prosecute, and deter the unauthorized disclosure of classified information.

The dangers of according a privilege to reporters as recipients of such leaks has long been apparent, as is evidenced by one of the rare cases brought under the Espionage Act, United States v. Morison, 844 F.2d 1057 (4<sup>th</sup> Cir. 1988). In that case, a government employee was prosecuted for leaking classified information to *Jane’s Defence Weekly*. The defendant asserted that his activity was not covered by the Espionage Act because that statute reached only “classic spying” and not “leaking” to the media, and that to hold otherwise would be to unnecessarily chill activity protected by the First Amendment.

The court rejected this defense, noting that it was supported neither by the plain language of the statute nor by its legislative history. In his concurring opinion in the Morison case, however, Judge Wilkinson noted the dangers inherent in according a privilege against prosecution in the context of a leak of classified information. “Rather than enhancing the operation of democracy,” Judge Wilkinson wrote, “this course would install every government worker with access to classified information as a veritable satrap. Vital decisions and expensive programs set into motion by elected representatives would be subject to summary derailment at the pleasure of one disgruntled employee.” Id. at 1083 (Wilkinson, J., concurring).

To avoid these difficulties, Federal courts wisely have refused to endorse a “reporter’s privilege.” In doing so, many of these same courts have predicted – and experience has confirmed – that the free flow of information will not be imperiled by the absence of such a privilege.

### **III. The Appropriate Balance Achieved by the Law and Justice Department Policy Would Be Upset by the Creation of a Federal “Reporter’s Privilege”**

Thus, while the Department of Justice understands the concerns that have motivated this Committee to take up these issues and to consider legislation in this area, it is the Department's firm belief that current law and Department of Justice policy governing the issuance of subpoenas to reporters and media organizations reflect an appropriate balance between the interest of the American people in the vigorous prosecution of criminals and the needs of a free press. In the Department's view, the proposal currently under consideration by this Committee – H.R. 2102, "The Free Flow of Information Act" – would upset that balance, to the detriment of law enforcement and, ultimately, the American people.

As an initial matter, supporters of the proposed reporter's privilege have pointed to certain recent high-profile cases as "proof" that the Department is breaking dangerous new ground and imperiling cherished First Amendment freedoms in its pursuit of media subpoenas. Such criticism, however, is long on rhetoric and short on substance, just as it was when the forerunners of today's critics made the very same arguments in the early 1970s – arguments the Supreme Court in Branzburg dismissed as "speculative" and unsupported by the evidence. If those critics were to be believed, we would have seen a marked decline in press freedoms in the wake of the Branzburg decision – but if anything, the opposite has occurred.

The claims of today's critics are no less speculative. When one gets past the overheated rhetoric, there is simply no evidence that the Department is now pursuing subpoenas of the press more aggressively or in greater numbers than it has in the past. Congress should demand a more rigorous demonstration that there is a problem in need of a remedy before it legislates a sweeping overhaul of a system that has effectively balanced the news-gathering functions of the news media and the needs of law enforcement for decades.

The proposal currently being considered by this Committee would have a dramatic and, it must be said, negative effect on the ability of federal law enforcement to prosecute serious crimes – including terrorism and other national security offenses. Several Justice Department officials have testified in congressional committees over the last two years regarding the Department's opposition to proposed legislation in this area. Rather than repeat all of the Department's objections that have been outlined by these other witnesses, I will outline several of the most serious flaws in the proposed legislation.

First, the proposed legislation would extend its broad "journalist's privilege" to a far larger class of "covered person[s]" than the prior versions of the legislation. Under section 4(2) of the bill, a "covered person" means "a person engaged in journalism and includes a supervisor, employer, parent, subsidiary, or affiliate of such covered person." 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." Under this expansive definition, anyone who publicly disseminates (*e.g.*, in a comment sent to an electronic bulletin board on the internet) any news or information that he has written or gathered on any matter of public interest constitutes a "covered person." Nationality, affiliation, occupation, and profession are irrelevant to this privilege.

Such a broad definition would accord the status of “covered person” to a terrorist operative who videotaped a message from a terrorist leader threatening attacks on Americans, because he would be engaged in recording news or information that concerns international events for dissemination to the public. 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. Any documents or information “related to” information possessed by such persons “as part of engaging in journalism” are immune from government process under the bill unless its complex and burdensome standards for overcoming the privilege are satisfied. H.R. 2102 compounds this definitional problem by extending its protections to “covered persons” regardless of whether the covered person and the “source of information” have a pre-existing agreement to keep the source’s identity a secret, and regardless of whether the source has freed the journalist from an agreement to maintain the source’s anonymity.

Second, 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 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 “essential” 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) nondisclosure of the information “would be contrary to the public interest.” *See* Bill section 2(a). These burdensome standards go far beyond what is permissible in restricting defendants’ Sixth Amendment rights in this context. *See, e.g., 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.”); *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.’”).

The third and perhaps most troubling flaw in the proposed legislation is the dramatic structural change it would work with respect to current law-enforcement practice – a change that will severely hamper our ability to investigate and prosecute serious crimes, including acts of terrorism. Under the proposed legislation, before allowing the issuance of a subpoena to the news media 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 imminent and actual harm to national security” and that “nondisclosure of the information would be contrary to the public interest.” H.R. 2102 at § 2(a)(3).

By its terms, then, H.R.2102 not only cedes to the judiciary the authority to *determine*

what does and does not harm 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 the national security is established. In so doing, the proposed legislation would transfer to the judiciary authority 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 national security interest. 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).

The import of the structural change that H.R. 2102 would make is not merely speculative, as becomes apparent when one considers how the law would work in practice. Under the current system, the issuance of subpoenas in a criminal matter is governed by Federal Rule of Criminal Procedure 17. That rule contains a provision whereby the recipient of a subpoena can move to quash the subpoena. Under the current rule, the recipient is required to file a motion with the court and 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 legislation, however, shifts this burden to the government, while



simultaneously increasing the amount of proof the government must introduce before 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.

Because the privilege created by H.R. 2102 could only be overcome when disclosure of a source “is necessary to prevent imminent and actual 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 few criminal investigations could satisfy the standard. Indeed, the bill would have the perverse effect of placing a greater burden on the government in criminal cases – including cases implicating national security – than in cases in which the government sought to identify a confidential source who has disclosed a valuable trade secret, personal health information, or nonpublic consumer information. For example, in cases in which the government sought the identity of a source who unlawfully disclosed national security-related information, the bill would require the government to show that disclosure of the source was necessary to prevent imminent and actual harm to the national security. This would mean that where damage had already been done to the national security as a result of a leak 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 find the identity of a source who had violated federal law by disclosing a trade secret. The person who leaks classified war plans or nuclear secrets would still be protected by the privilege if the journalist to whom he leaked the information has already published it, while the person who leaked trade secrets would not. Thus, the evidentiary threshold proposed by H.R. 2102 would create a perverse incentive for “covered persons” to protect themselves by immediately publishing the leaked information, even if national security would be harmed, because once the harm actually occurs it will be harder to investigate the source.

Even if we assume the government could meet the H.R. 2102’s very high standard, doing so in cases involving national security and terrorism will almost always require the government to produce extremely sensitive and even classified information. It is therefore not an overstatement to say 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.<sup>1</sup>

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<sup>1</sup> The Department also notes that H.R. 2102 imposes several additional requirements over and above the extremely high evidentiary hurdles outlined above, including a requirement that “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 apparently inescapable bind. If prosecutors may only seek confidential source information in order to “verify published information,” then they will never be able to obtain source

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As I noted at the outset, when confronted with a direct conflict between public's interest in effective law enforcement and the its interest in the free flow of information, courts have very consistently found that the former outweighs the latter. The proposed legislation upsets this balance. It would summarily scrap a system that has successfully balanced the competing interests of law enforcement and the free flow of information only to replace it with one that, at best, will yield uncertain results at a time when the nation can ill afford it. And it does so without any hard evidence that the public's interest in the free flow of information is in any way being harmed or impaired by the efforts of law enforcement to investigate and prosecute crime.

The Department recognizes that there are legitimate competing interests at stake when the newsgathering process and the criminal justice system intersect. But history has demonstrated that the protections already in place, including the Department's own rigorous internal review of media subpoena requests, are sufficient and strike the appropriate balance between the free dissemination of information and effective law enforcement.

The Justice Department looks forward to working with the Committee on these important issues. I would be happy to answer any questions you may have.

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information concerning a leak of national security information: If the information is published, then the harm has already been done, and prosecutors would no longer be preventing a threat to national security sufficient to satisfy section 2(a)(3)(A) of H.R. 2102, and so could not compel disclosure. If the leaked national security information is not published, then prosecutors would not be seeking information "limited to the purpose of verifying published information," as required by section (2)(b)(1) of the bill, and so could not compel disclosure. In other words, the bill would seem to provide absolute immunity to leakers of sensitive national security information.