



November 18, 2009

The Honorable Patrick J. Leahy
Chairman, Senate Judiciary Committee
433 Russell Senate Office Building
Washington, DC 20510-4502

The Honorable Jeff Sessions
Ranking Member, Senate Judiciary Committee
335 Russell Senate Office Building
Washington, DC 20510-3802

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OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

RICHARD ZACKS
TREASURER

Re: **Reporters' Shield Legislation**
S. 448, The Free Flow of Information Act of 2009

Dear Chairman Leahy and Ranking Member Sessions:

On behalf of the ACLU, a non-partisan organization with over half a million members, countless additional supporters and activists, and 53 affiliates nationwide, we are writing to recommend that the Committee substitute the compromise negotiated between the administration and the sponsors for the version of S. 448 that came out of the Committee's mark up session (hereinafter the 'mark up'). The negotiated substitute (hereinafter, the 'substitute') does not go as far as we would like in protecting the confidentiality of reporters' sources, but it represents an improvement over the mark up by expanding coverage and by protecting the ability of criminal defendants to mount an adequate defense.

To further First Amendment rights, the ACLU supports the concept of a reporters' privilege or shield to protect his or her sources, with a qualified exception to protect the constitutional rights of criminal defendants to fair trials.¹ We are concerned that the privilege defined in the S. 448 mark up does not cover all journalists entitled to coverage, does not go far enough to protect journalists' sources from civil litigants or from criminal prosecutors.

¹ For a more comprehensive review of the need for a reporters' shield law, see "Publish and Perish: The Need for a Federal Reporters' Shield Law," ACLU, 2007, at: http://www.aclu.org/pdfs/freespeech/publishperish_20070314.pdf

We are also concerned that the national security exception could be misused in such a way as to nullify the privilege. Finally, we are concerned that the outright exclusion of non-confidential sources and information will have a chilling effect on the ability of reporters to gain the trust of potential sources and will restrict the free flow of information to the public through media outlets. The substitute only improves some of these problems, but the improvements are significant and worthy of support.

The substitute establishes a broader coverage than the mark up and establishes a reasonable exception to protect the rights of criminal defendants to pierce the privilege. In these respects, the substitute is an improvement over the earlier versions of the Senate bill. Even this improved version falls short in the protections it offers journalists from civil litigants. More importantly, it sets a very low threshold for criminal prosecutors, thus risking the establishment or extension of a trend of criminal prosecutors looking to the journalism community as a supplemental arm of law enforcement investigators. More than any other single factor, such a trend would work to restrict the free flow of information from confidential sources to reporters about all forms of criminal activity as prospective informants learned that their media contacts would be less able to assure their confidentiality.

Discussions between the administration and bill sponsors seemed to focus on treatment of national security issues. To the extent that these discussions led to a more prospective form of exception to the privilege, focused on the prospect of additional harm, the negotiations left the bill in better form. Nevertheless, the exception is unnecessary because Section 4 already provides an exception to mitigate a threat of substantial bodily harm. Accordingly, we believe the exception is superfluous and merely serves to present the opportunity for unwarranted exceptions to the privilege.

The other changes to the mark up are more significant and more important. The revised provision defining who is covered under the bill provides a cogent set of parameters and clearer guidance to journalists and litigants alike. It focuses on the intention of the reporter to publish as he or she is gathering the information that may be the subject of a subpoena. Such a foundation is far more logical than such under-inclusive factors as the frequency of the reporter's journalism activities or the existence of compensation for such activities.

We also believe that the relatively low threshold that will permit those accused of crimes to pierce the privilege if necessary to prove their innocence is an appropriate exception to the protection of source confidentiality. While reporters' sources are entitled to heightened protection by virtue of the First Amendment reference to a free press, there is one class of impacted individuals who hold an even greater protected status under our Constitution. Government must not restrict the ability of those whose liberty interests are at stake from mounting an adequate and full defense. Any privilege protecting a reporter from testifying in criminal proceedings would impose such a hardship. The threshold set in the substitute establishes the right test.

Notwithstanding these improvements, the substitute fails to shield journalists sufficiently from overzealous prosecutors. The state is armed with an array of prosecutorial tools including, in particular, the combined array of investigators in police and prosecutor offices. Once someone

has been charged with a crime, these resources are focused not necessarily on seeing justice done, but rather on proving the guilt of the accused. Criminal prosecutors do not need, nor does the Constitution authorize them, to rely on the confidential sources of reporters to supplement their otherwise substantial resources. We are disappointed the substitute offers criminal prosecutors the same low threshold to compel reporter testimony as offered to constitutionally-protected criminal defendants.

Despite these shortcomings, we urge the members of the Committee to support the substitute. In the House and Senate bills, we see the outline of a final bill that will at long last establish a federal reporter shield law. A consistent standard across the nation's federal courts will give reporters and their sources predictability, thus encouraging the free flow of information, one of the core goals of the First Amendment free press clause.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael W. Macleod-Ball". The signature is written in a cursive, slightly slanted style.

Michael W. Macleod-Ball
Acting Director, Washington Legislative Office

cc: Members of the Committee