WASHINGTON
LEGISLATIVE OFFICE

October 31, 2007

The Honorable Harry Reid
Majority Leader
United States Senate

The Honorable Mitch McConnell
Minority Leader
United States Senate

Re: Bring H.R. 2102, the Reporters' Shield Bill, to the Floor to Strengthen the Public's Right to the Free Flow of Information.

Dear Majority Leader Reid and Minority Leader McConnell:

On behalf of the ACLU, a non-partisan organization with hundreds of thousands of activists and members and 53 affiliates nation-wide, we urge you to bring H.R. 2102, the Free Flow of Information Act of 2007, to the floor in place of the Senate companion bill, S. 2035.

To further core First Amendment rights, the ACLU generally supports the concept of a reporters' privilege or shield to protect journalists from disclosing their confidential sources.[1] We applaud the efforts of the bipartisan sponsors of S. 2035, particularly Senators Leahy, Lugar, and Specter, for their leadership in crafting this important legislation in cooperation with Representatives Boucher, Conyers, and Pence, the sponsors of H.R. 2102. Both bills enhance the limited relief journalists have had from federal subpoenas following *Branzburg v. Hayes*[2] through a qualified, rather than an absolute, privilege.[3]

Among the two bills, H.R. 2102 strikes the better balance between the public's right to the free flow of information and other interests. While we remain concerned about the application of exceptions to the definition of "covered person,"[4] the House bill provides for more meaningful judicial

AMERICAN CIVIL LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15TH STREET, NW, 6TH FL
WASHINGTON, DC 20005-2313
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

Caroline Fredrickson
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET,18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

---

[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.

[2] 408 U.S. 665 (1972).

[3] Senator Lugar and Representative Pence originally proposed legislation that would have made the reporters' shield absolute. While we appreciate their commitment to freedom of the press, there are some circumstances when a qualified privilege is necessary to protect other constitutional rights. For example, under the Sixth Amendment, a criminal defendant must have access to information necessary to receive a fair trial.

[4] The exceptions exclude individuals designated by as terrorists, which are often based on unsubstantiated allegations and overbroad restrictions on association and speech. The exceptions are essentially identical in the House and Senate bills.

oversight and a balancing test less subject to government abuse. We encourage you to bring H.R. 2102 to the floor without delay. **H.R. 2102 already passed the House 398 to 21, with strong bipartisan backing**. If H.R. 2102 is brought to the Senate floor, the ACLU would support its passage.

A Federal Reporters' Privilege Is Needed to Maintain the Flow of Information to the Public.

From Deep Throat to Enron, the public has been informed about matters of public interest through reporters who rely on confidential sources. Reporters have been able to obtain this information because these confidential sources believed they would be assured anonymity. Increasingly, however, reporters are subpoenaed to identify their sources, particularly in federal matters, where no statutory reporters' privilege exists.

Currently, forty-nine states and the District of Columbia recognize some form of reporters' privilege, either through statute or common-law.[5] In the 5-4 decision in *Branzburg*, the Supreme Court refused to find a First Amendment privilege for reporters, even though five justices recognized at least a qualified privilege.[6] Since Congress has not yet acted on creating such a privilege, none exists at the federal level.

The absence of a federal reporters' shield law has undercut state shield laws. As the Attorneys General of 34 states and D.C. have observed, "The consensus among the States on the reporters' privilege is as universal as the federal courts of appeals decisions on the subject are inconsistent, uncertain and irreconcilable."[7] A federal shield law is needed to fix those problems. If a reporter is unable to provide her sources confidentiality, it is unlikely that those sources will reveal the information, leaving the public in the dark. Because information is essential to an informed electorate, the ACLU supports the concept of providing a qualified privilege to reporters from having to reveal their confidential sources.

H.R. 2102 Protects the Free Flow of Information to the Public Better Than S. 2035.

H.R. 2102, as enacted, provides more meaningful protection for the free flow of information to the public than S. 2035 in three ways. First, H.R. 2102 applies the balancing test between the party's need for the information against the public's interest in preserving source confidentiality in all cases. Second, H.R. 2102 empowers federal judges to determine application of all the exceptions. Third, H.R. 2102 provides that to invoke the national security exception, the government must show that

---

[5] Thirty-three states and the District of Columbia have adopted a statutory reporters' privilege. Sixteen states have recognized some form of reporters' privilege through common-law interpretation. Wyoming is the only state that has not yet recognized a reporters' privilege in any form.

[6] *Branzburg*, 408 U.S. at 665. Although Justice Powell was one of the five in the majority, he also authored a concurring opinion in which he found that reporters have a qualified privilege to refuse to testify regarding criminal conduct. *See id.* at 709 (Powell, J., concurring). The remaining four justices recognized either an absolute reporters' privilege, *see id.* at 712 (Douglas, J., dissenting), or a qualified privilege to be assessed by balancing "the public interest in the administration of justice and the constitutional protection of the full flow of information," *Id.* at 745 (Stewart, J., joined by Brennan and Marshall, JJ., dissenting). Given the majority's categorical refusal of the reporters' claims, Justice Powell's concurring opinion served primarily to muddy the waters. The Court did note, however, that Congress and the states were free to enact such privileges if they so desired. *See id.* at 706. In the wake of *Branzburg*, several states accepted that invitation.

[7] Brief for Thirty-Four States and D.C. as Amici Curiae Supporting Petitioners Judith Miller and Matthew Cooper, *Miller v. United States*, 545 U.S. 1150 (2005) (Nos. 04-1507 & 04-1508), 2005 WL 1317523.

information sought from a subpoena is necessary to prevent an act of terrorism or other national security threat.

(1) H.R. 2102 Provides a Meaningful Balancing Test that Gives Appropriate Weight to the Public's Right to the Free Flow of Information.

In *Branzburg*, Justice Stewart proposed a three-part test to balance "the public interest in the administration of justice and the constitutional protection of the full flow of information."[8] To overcome the reporters' privilege, the government would have to show: (1) probable cause that the information sought is relevant to a criminal matter; (2) the information "cannot be obtained by alternate means less destructive of First Amendment rights;" and (3) a "compelling and overriding interest in the information."[9]

S. 2035 does not include a meaningful balancing test. Although Section 2 of the bill requires the party seeking the subpoena to show that they have "exhausted all reasonable alternative sources" and the information is "essential"[10] to their case, it does not require any balancing with the public's interest in the information. S. 2035 merely requires "*taking into account* both the public interest in compelling disclosure and the public interest in gathering news and maintaining the free flow of information."[11] The bill's language eviscerates the privilege by allowing a reporter to be compelled to reveal an anonymous source regardless of need, as long as the court takes the public's interest "into account."

In contrast, H.R. 2102 does not permit a subpoena to be issued unless a federal court finds "that the public interest in compelling disclosure of the information or document involved *outweighs* the public interest in gathering or disseminating news or information."[12] This requirement tracks the existing Justice Department guidelines under which the Attorney General must "strike the proper 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."[13] Plainly, a federal court should reject a request to subpoena a reporter in cases where the public's interest in maintaining the confidentiality of source information outweighs the government's need for that information.

(2) H.R. 2102 Ensures that Federal Courts, and not Self-Interested Parties Like the Government, Determine When Exceptions to the Shield Law Apply.

The most significant contribution of a federal shield law is that it provides for oversight by a federal court, instead of the present practice of vesting unfettered discretion in the Attorney General.[14] Judicial oversight is especially critical in cases where the government alleges that a subpoena is

---

[8] *Id.* at 745 (Stewart, J., dissenting).

[9] *Id.* at 743 (Stewart, J., dissenting). Justice Stewart's test is similar to one proposed by the reporter in *Caldwell* one of the four consolidated cases decided in *Branzburg*. *Cf. id. with Caldwell*, 434 F.2d 1081, 1090 n.10 (9th Cir. 1970), *rev'd*, *Branzburg*, 408 U.S. at 665.

[10] S. 2035 § 2(a)(1)-(2). H.R. 2102 uses the word "critical" instead of "essential." *See* H.R. 2102, § 2(a)(2).

[11] S. 2035 § 2(a)(3) (emphasis added).

[12] H.R. 2102 § 2(a)(4) (emphasis added).

[13] 28 C.F.R. § 50.10(a).

[14] *See* 28 C.F.R. § 50.10.

necessary to prevent criminal or tortious conduct or threats to public safety such as death, kidnapping, or substantial bodily injury. H.R. 2102 has that oversight, while S. 2035 does not.

Section 3 of S. 2035 provides that the reporters' privilege shall not apply to "eyewitness observations of alleged criminal conduct or commitment of alleged criminal or tortious conduct by the covered person, including any physical evidence or visual or audio recording of the observed conduct."[15] During markup, the Committee adopted Senator Kyl's amendment removing the requirement that a federal court to first determine "that the party seeking to compel disclosure under this section has exhausted reasonable efforts to obtain the information from alternative sources." Removing this language, which remains in H.R. 2102 as enacted,[16] voids the privilege without any consideration of the public's interest in the free flow of information on a mere allegation of criminal or tortious conduct. It also is inconsistent with the language in Section 5 of the bill, which requires a judicial determination under a relaxed "preponderance of the evidence" standard.

Section 4 of S. 2035, an exception to prevent death, kidnapping, or substantial bodily injury, suffers from a similar infirmity. The exception provides that the reporters' privilege "shall not apply to any protected information that is reasonably necessary to stop, prevent, or mitigate a specific case of (1) death; (2) kidnapping; or (3) substantial bodily harm."[17] Unlike H.R. 2102 as enacted,[18] the Senate bill does not empower a federal court to make this determination, allowing the government to nullify the privilege by merely alleging disclosure is necessary for the public safety.

Federal courts must be empowered to decide when all of the exceptions to the reporters' shield apply. Without judicial oversight, the government will be the ultimate arbiter of when a journalist should be compelled to disclose anonymous sources, including those who have revealed illegal activities by government officials including torture,[19] warrantless wiretapping,[20] kidnapping and detention.[21] H.R. 2102 provides meaningful oversight by ensuring that self-interested government officials cannot abuse the shield's exceptions to deny the public information necessary for self-governance.

---

[15] S. 2035 § 3.

[16] *See generally* H.R. 2102 § 2(e) (providing that the privilege shall not apply in case of criminal or tortious conduct unless "a Federal court determines that the party seeking to compel such disclosure has exhausted all reasonable efforts to obtain the information, record, document, or item, respectively, from alternative sources").

[17] S. 2035 § 4.

[18] *See generally* H.R. 2102 § 2(a)(3)(B) (requiring a federal court to determine "by a preponderance of the evidence, after providing notice and an opportunity to be heard" to the reporter, that the public safety exception applies under the balancing test).

[19] *See* Jess Bravin, *Pentagon Report Set Framework For Use of Torture*, WALL ST. J., June 7, 2004, at 1; Seymour Hersh, *Torture at Abu Ghraib*, THE NEW YORKER, May 10, 2004.

[20] *See* James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

[21] *See* Glenn Kessler, *Rice to Admit German's Abduction Was an Error On Europe Trip, Rice Faces Scrutiny on Prisoner Policy*, WASH. POST, Dec. 7, 2005, at A18; Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake: German Citizen Released After Months in 'Rendition'*, WASH. POST, Dec. 4, 2005, at A1; Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1.

(3) H.R. 2102 Ensures that the National Security Exception Only Applies When Necessary to Prevent an Act of Terrorism or Other Specified Harm.

We agree with Senator Lugar that an exception to a reporters' privilege should be made where there is evidence that disclosure is "necessary to prevent imminent and actual harm to national security."[22] While H.R. 2102 adopts a more relaxed standard than Senator Lugar proposed, we believe it strikes a better balance than the Senate bill between the public's right to the free flow of information and legitimate national security interests.

The national security exception in S. 2035 is too broad. Section 5 of S. 2035 provides that the privilege "shall not apply to any protected information that a Federal court has found by a preponderance of the evidence would *assist* in preventing" acts of terrorism or "other significant and articulable harm."[23] Merely showing privileged information "assists" in protecting national security, regardless of the need for the information or the nature of the alleged threat, allows the exception to swallow the privilege. Presumably, there would be few cases when this low threshold would not be met. Far too often, we have witnessed the government invoke "national security" in its efforts to suppress press reports of illegal or embarrassing activities. Allowing the government to decide when disclosure of a source "assists" national security is a license to chill anonymous sources disclosing unfavorable information.

In contrast, H.R. 2102, as enacted, strikes a more appropriate balance by limiting the national security exception to cases where it is "necessary to prevent, or to identify any perpetrator of, an act of terrorism … or other significant and specified harm to national security with the objective to prevent such harm."[24] We believe that the House bill's language is sufficiently narrow by requiring proof that disclosure is necessary to prevent harm to the national security. The standard in H.R. 2102 minimizes the government's ability to manipulate the exception to apply it to cases where no legitimate threat to national security exists.

Bring H.R. 2102 to the Floor for a Vote and Pass it Without Delay.

We applaud Senators Leahy, Lugar, and Specter, and the others working on the federal reporters' shield legislation, which obviously required some negotiation and compromise. For a people to truly govern themselves, they must have information about what their government is doing in their name. As James Madison said in 1822, "A popular government without popular knowledge or the means of acquiring it is but a prelude to a farce or a tragedy or perhaps both."[25] H.R. 2102 is an important step in guaranteeing the public access to information and avoiding both the farce and the tragedy.

---

[22] *Reporters' Shield Legislation: Issues and Implications*, *Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 1st Sess. (testimony of Sen. Richard Lugar) (July 20, 2005).

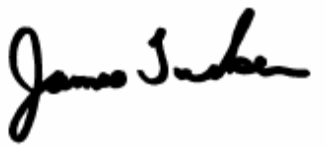
[23] S. 2035 § 5 (emphasis added).

[24] H.R. 2102 § 2(a)(3)(A).

[25] Letter from James Madison to W.T. Barry, Aug. 4, 1822, 9 WRITINGS OF JAMES MADISON 103 (G. Hunt ed. 1910).

We know you share our commitment to a free press and the free flow of information to the public. **We encourage you to bring H.R. 2102 to the floor and pass it without delay.**

Sincerely,



Caroline Fredrickson
Director, Washington Legislative Office

James Thomas Tucker
Policy Counsel

cc: Senators