September 9, 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

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 urge you to amend S. 448 during the forthcoming markup to strengthen the privilege against compelled testimony as it applies to litigants other than defendants in criminal proceedings. We also urge you to modify the superfluous national security exception to the privilege against compelled testimony.

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 S. 448 does not go far enough in a civil context and that the national security exception could be misused in such a way as to nullify the privilege. We are also 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.

[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

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Maintain the Free 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 their sources – both confidential and non-confidential. Reporters have been able to obtain information because their sources trust them to publish information in a responsible fashion and, in some cases, because they believe they would remain anonymous. Increasingly, however, reporters are being subpoenaed for their sources, particularly in federal matters, where no reporters' privilege exists. In addition, reporters are being called upon to serve as de facto investigators for prosecutors and civil litigants when they are called to testify even about non-confidential sources and information gathered through their journalistic efforts.

Currently, forty-nine states and the District of Columbia recognize some form of reporters' privilege, either through statute or common law.[2] In 1972, the Supreme Court, in a 5-4 opinion, refused to find even a qualified First Amendment privilege for reporters.[3] Because Congress has not yet acted on creating such a privilege, none exists at the federal level.

S. 448 builds a framework with very modest protections for confidential sources and information in federal proceedings. A reporter can be compelled to reveal confidential information if it is essential to the pending legal proceeding. Further, a reporter can be compelled to reveal non-confidential information without restriction. While this framework arguably preserves a criminal defendant's right to a fair trial by allowing him or her to mount a proper defense, it offers insufficient protection in all other circumstances.

Create a Logical Framework of Competing Interests

A better framework would establish a logical matrix of standards. The standard should vary depending on whether the information to be disclosed is confidential and whether the party seeking disclosure is doing so in the exercise of the competing constitutional right to a fair trial. At one end of the spectrum, a criminal defendant would have nearly unfettered access to relevant non-confidential information. At the other end of the spectrum, a civil litigant would have no entitlement to compel testimony from a reporter about information learned under a promise of confidentiality. There are four broad categories in such a matrix:

1. Non-confidential information, criminal defendant: The constitutional rights of the criminally accused must take precedence where the reporter has not promised confidentiality, as long as the testimony is relevant to the defense. Because the bill offers no protection for any non-confidential information, S. 448 achieves this result.

[2] Thirty-one states have adopted a reporters' privilege through statute. Eighteen states have recognized some form of reporters' privilege through common-law interpretation. Wyoming is the only state that has not recognized a reporters' privilege in any form.

[3] *Branzburg v. Hayes*, 408 U.S. 665 (1972). 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. 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. In the wake of *Branzburg*, several states accepted that invitation.

2. Non-confidential information, other litigants: The constitutional implications are less in these circumstances than in others and a balancing of interests is appropriate. In our view, the litigant should only be able to compel a reporter's testimony if it is material to the party's case. This would offer greater protection against compelled testimony than the pending bill, which specifically excludes non-confidential information from protection, while encouraging sources to provide information to reporters on a non-confidential basis.
3. Confidential information, criminal defendant: There are competing constitutional interests at stake – the rights of a free press and the rights of a criminal defendant. In our view, due to the life and liberty interests at stake, the criminal defendant must be able to access even confidential information when it is shown to be necessary to the defense. This standard is roughly equivalent to that established in the bill – which requires a showing that the testimony is 'essential'.
4. Confidential information, other litigants: Litigants who aren't criminal defendants do not have the same constitutional protections and, accordingly, the rights of a free press should take precedence. In these circumstances, a reporter must be allowed to protect the confidentiality of his or her sources and compelled testimony should be barred unless one of the enumerated exceptions applies. The pending bill provides a greatly reduced standard, which we believe does not adequately reflect the protections envisioned in the First Amendment.

We urge the committee to delete the exclusion of non-confidentiality in Section 7, to modify Section 2 to reflect the matrix defined above, and to add definitions to adequately distinguish confidential and non-confidential protected information in Section 8 of the bill.

Fold the Overbroad National Security Exception into the Bodily Injury Exception

The bill includes an overbroad national security exception that should be significantly narrowed. Section 5 of the bill creates an exception where a federal court has found by a preponderance of the evidence that disclosure would assist in preventing an act of terrorism or significant harm "to national security that would outweigh the public interest in newsgathering and maintaining a free flow of information to citizens."

At a minimum, the harm to be avoided by invoking the exception must be "imminent." Absent a requirement of imminent harm, the government could easily override the privilege on the basis of some suggested harm that may not occur until well after the information could have been obtained from other sources. The standard of "significant harm to national security" is far too broad, particularly when the government routinely relies upon conclusory statements when called upon to document such circumstances.[4]

A reporters' shield is not inconsistent with national security. The fledgling democracy in Afghanistan protects the confidentiality of journalists' sources.[5] Our European allies have long

[4] This is not inconceivable, since the Administration already uses "state secrets" to shut down litigation against its warrantless wiretapping program.
[5] *Publish and Perish, supra,* at 21.

faced the threat of international terrorism, yet provide protection for journalists' sources.[6] Austria and France provide absolute privileges for journalists, while at least 15 additional nations have a qualified privilege.[7] Sweden makes it a crime to disclose a source without the source's permission. Under its Freedom of the Press act, unauthorized disclosure is punishable by a fine and up to one year in jail.[8] Thus, other countries have successfully implemented shield laws even in the face of international terrorism.

Moreover, Section 4 of the bill already provides an exception to prevent death, kidnapping or substantial bodily injury. It is difficult to envision a threat to national security that did not also include a threat of bodily harm to someone. Section 5 is overbroad and superfluous and, accordingly, we urge it to be deleted from the bill during markup.

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." S. 448 is an important step in guaranteeing the public access to information, but could be significantly improved by strengthening the privilege as it applies to those other than criminal defendants. With such changes, we are confident our government could take a significant step toward ensuring it avoids both the farce and the tragedy.

Sincerely,

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

cc: Members of the Committee

[6] Id.
[7] Id.
[8] Id.