

November 17, 2006

The Honorable Arlen Specter
United States Senate
Chairman, Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510
Attention: Barr Huefner

Re: Response to Questions of Senators Jon Kyl and Edward Kennedy
Regarding Proposed Federal Reporters' Shield Legislation

Dear Senator Specter:

I am writing in response to your letter to me dated October 12, 2006 asking that I respond in writing to questions that Senators Jon Kyl and Edward Kennedy posed after the September 20, 2006 hearing regarding "Reporters' Privilege Legislation: Preserving Effective Federal Law Enforcement" and S. 2831. I have set out the questions in boldface below. My answers follow each question. As you requested, I am sending an electronic copy of this response to Barr_Huefner@judiciary.senate.gov.

Questions From Senator Jon Kyl

Section 3

1. What problems could arise from using a FISA definition to define persons who should not receive the privilege?

Under FISA, an "agent of a foreign power" is a person who, through clandestine intelligence gathering activities, international terrorism, or otherwise, poses a threat to the national security of the United States, or is an employee or agent of a foreign nation. FISA permits the use of electronic surveillance, physical searches, and other techniques to obtain from such persons information relevant or necessary for purposes of shaping foreign policy or safeguarding national security. For FISA to be effective, two kinds of secrecy are necessary.

First, the government's determination that a person is an agent of a foreign power and its investigation of that person must remain secret. Otherwise, the person will take steps to evade or frustrate surveillance, flee the country, tamper with evidence, etc. Accordingly, the government does not notify people who are determined to be agents of foreign powers. FISA permits the government to keep FISA applications and orders

secret and to conduct electronic surveillance and physical searches without giving notice to the target of such investigation.

Second, the underlying evidence that the government uses to determine who is an agent of a foreign power, such as confidential source information, signals intelligence, and the like, must remain secret to safeguard sources and methods of information collection.

Use of the "agent of a foreign power" definition as a requirement for an exception to a statutory federal journalist's privilege could undermine both of those kinds of secrecy. In order to take advantage of the exception, the government would be required to assert in court that a particular journalist who had asserted the privilege was an agent of a foreign power. This would alert the journalist to his status and thus preclude effective covert investigation.

In addition, to establish that such an "agent of a foreign power" exception was applicable, the government presumably would have to present evidence to demonstrate to the court that the privilege-asserting journalist was indeed an agent of a foreign power. This would threaten the secrecy of the government's sources and methods of information gathering. Even if the government were permitted to make an *ex parte, in camera* showing of the evidence that supported a determination that a journalist was an agent of a foreign power, or make use of some other type of CIPA-like protection for its underlying evidence, those solutions would not address the first problem. Even if the government could keep its underlying evidence secret, it nonetheless would be forced to reveal its determination that a journalist was an agent of a foreign power as defined in FISA.

By requiring such disclosure, the proposed legislation would put the government between a rock and a hard place: requiring that it either disclose to the actual or potential target of a FISA investigation that the government considered him to be an agent of a foreign power, or forgo a claim that the journalist's privilege is inapplicable.

By way of example, suppose that the proposed journalists' privilege, including the FISA-based exception, were to become law. Suppose further that the government had information from confidential sources that a foreign journalist residing in the United States was secretly supplying information to Hezbollah or another foreign terrorist organization, causing the government to conclude that the journalist was an "agent of a foreign power." This determination likely would cause the government to either initiate FISA electronic surveillance or contemplate doing so. Suppose that the journalist then published a story based on a leak of classified information, a grand jury issued a subpoena demanding the journalist's testimony about the source of the leak, and the journalist asserted the journalists' privilege. If forced to claim that the journalist was an

"agent of a foreign power" in order to overcome the claim of privilege (as the proposed legislation requires), the government would have to reveal to the journalist that he is a potential target for FISA surveillance or searches. This could frustrate FISA-based investigation.

As I pointed out in my testimony, there are other ways of creating a similar exception to a federal statutory journalist's privilege without jeopardizing potential or actual FISA investigations. As my prepared testimony noted:

A better approach might be to tie the carve-out to the designation of a journalist or media outlet as a "Specially Designated Global Terrorist" [SDGT] under Executive Order 13224, and perhaps include non-designated media outlets that are associated with designated SDGTs. The President, the Secretary of the Treasury, the Secretary of State, and the Attorney General are involved in the process by which persons and entities are designated as SDGTs based on their status as or affiliations with terrorist organizations and terrorists. Because SDGT designations are made public, and can be based on undisclosed classified evidence, use of SDGT status or association with an SDGT as the trigger for the carve-out will not jeopardize classified information or otherwise imperil national security.

Section 4

2. **What is the result, in sections 4(a), 5(a), and 6(a), of the language "may not compel a journalist, *any person who employs or has an independent contract with a journalist*" in the Act? Does this language extend the privilege to such an extent that an evidentiary privilege will exist for people that have no connection to newsgathering? How could this privilege be limited so that it would apply to investigative reporters only?**

From the context, the italicized language appears designed to safeguard employers of journalists and media outlets that have independent contracts with journalists from being compelled to disclose source information that the proposed legislation would preclude being compelled directly from journalists themselves. For example, a media outlet that either employs or has hired a journalist on contract to write a story may have access to information identifying the journalist's source, such as rough notes, telephone records, or the like. If the italicized language were not in the statute, the government or a civil litigant could compel production of the source information from the medial outlet even if the journalist had a valid claim of privilege.

If that was the intent of inclusion of such language, it may be that the language is

overbroad because it appears to include anyone who has an independent contract of any sort with a journalist, such as a person who the journalist hires on contract to clean his swimming pool. This potential overbreadth will not be likely to "extend the privilege to such an extent that an evidentiary privilege will exist for people that have no connection to newsgathering," however. This is because the language that follows the potentially overbroad passage makes clear that the privilege extends only to:

(1) information identifying a source who provided information under a promise or agreement of confidentiality made by the journalist while acting in a professional newsgathering capacity; or (2) any records, communication data, documents, or information that the journalist obtained or created while acting in a professional newsgathering capacity and upon a promise or agreement that such records, communication data, documents, or information would be confidential.

This limiting language would seem to ensure that the privilege would not be extended to people who have no connection to newsgathering.

3. What unintended consequences could result from the fact that this bill makes it more difficult for prosecutors to pierce the media privilege than it does for civil litigants?

One could envision a criminal case in which a criminal defendant would be able to satisfy the requirements of Section 5(b) of the proposed legislation, thereby enabling the defendant to have a court compel a journalist, under threat of incarceration, to disclose to the defendant source information. In the same case, the prosecutor may be unable to compel the journalist to disclose information. This is because prosecutor would not only have to satisfy the same requirements that apply to the defendant, but also the additional requirement in Section 4(b) that the information sought "is critical to the investigation or prosecution, particularly with respect to directly establishing guilt or innocence." (Criminal defendants need show only that the information sought "is *relevant* [not critical] to the question of guilt or innocence.") Similarly, under the proposed legislation, federal prosecutors, but not criminal defendants, would be obligated, to the extent possible, to limit subpoenas to journalists to "verification of published information" and "surrounding circumstances relating to the accuracy of the published information." It certainly is possible that the same journalist source information could be available to a defendant but inaccessible to the prosecution.

Similarly, if there was related civil litigation, in order to overcome a claim of the journalists' privilege, the civil litigants would have to establish only that the evidence sought "is critical to the successful completion of the civil action," without the added hurdle that applies to criminal prosecutors of showing "particularly with respect to

directly establishing guilt or innocence.” Once again, this may make journalist source information available to civil litigants but not criminal prosecutors.

- 4. In Section 4, the Act provides that the reporter’s privilege can be pierced if “a crime has occurred.” If a co-conspirator was caught before committing the underlying offense of the conspiracy, might this bill prevent a prosecutor from compelling a reporter to reveal information to prevent the underlying crime that has not yet occurred?**

I am not sure that I understand the question. This requirement in Section 4(b) apparently would be satisfied by the commission of the crime of conspiracy, even of the underlying substantive crime that is the object of the conspiracy has not yet occurred. It would not apply if the effort to compel the journalist to reveal source information preceded the commission of any crime, including an attempt or conspiracy.

- 5. Sections 4, 5, and 6 allow information to be compelled only if it is “critical.” What is a possible problem with determining whether information can be compelled based upon whether the information is “critical”? What is a better standard to use, and why would it be better?**

“Critical” in this context likely means highly probative. In the context of Section 4(b), it would require that federal prosecutors seeking to compel journalist testimony in a grand jury investigation reveal the role that the testimony would play and its importance in the overall investigation in order to satisfy the “critical” requirement. This would entrench on prosecutors’ ability to conduct an investigation and result in judicial second-guessing of investigative strategy.

Given the resources involved in seeking to compel journalists to testify, it is unlikely that federal prosecutors will do so unless the information they seek is critical to their investigations or prosecutions. As a result, it is not clear that the requirement is necessary.

- 6. The free flow of information is at issue in this bill. Why does the bill distinguish between published and unpublished material? Is this distinction relevant to the free flow of information?**

To my knowledge, the only section of the proposed legislation that draws this distinction is Section 4(b)(2), which imposes on prosecutors seeking to compel a journalist to reveal source information a requirement that “to the extent possible, the subpoena — (A) avoids requiring production of a large volume of unpublished material; and (B) is limited to — (i) the verification of published information; and (ii) surrounding circumstances relating to the accuracy of the published information.” This requirement

makes little or no sense in the present legislation. A previous version of the proposed bill, S.1419, set out two different types of journalists' privileges, one for non-source information (such as video out-takes) and one for source information. The more recent proposal, S. 2831, contains a single privilege for source information. The above-quoted requirement from Section 4(b) of S. 2831 might be appropriate to a journalists' privilege regarding non-source information but appears misplaced in a privilege, like that set out in S. 2831, that purports to protect only source information.

7. Exigent circumstances can arise in a criminal investigation requiring prosecutors to secure evidence before it is destroyed by a co-conspirator. Should an exigency exception apply to section four so that investigators can secure evidence that could be destroyed?

It is true that the destruction of evidence is a concern in many federal criminal investigations. It is not clear, however, that the inclusion of an exigency exception would remedy the problems that the proposed legislation creates in this regard. There are two reasons why the inclusion of an exigency exception would likely be ineffective as a means of avoiding the destruction of evidence. First, once the privilege is in place, such an exception would require that the prosecution prove the existence of exigent circumstances to a court. The government will not always have sufficient evidence to do so even in cases in which there is a danger of evidence destruction. Second, the need to have a hearing to determine whether there is exigency will provide those inclined to destroy evidence ample time to do so.

Section 5

8. Although a journalist would not want to release *materials* that could reveal the identity of his source, isn't it important, at least in the context of a criminal defendant, that defendants have access to any exculpatory *materials*? Should the presumption be that a criminal defendant *must* get such materials, but that the judge could redact them so that a source would not be revealed?

This proposed solution would not work. Access to the source will likely be essential. There are at least two problems here. First, there may be no independent "materials." Instead, there may be only a news story that quotes exculpatory information as having come from an anonymous source. Without access to the source, the criminal defendant would have nothing useful other than an inadmissible hearsay newspaper account. Access to the source may also provide additional exculpatory information. Second, even if there were some exculpatory "material" other than the newspaper account, the source might be necessary for the admission of the material in a court proceeding.

9. **The rights of criminal defendants are encompassed in a body of 6th Amendment law. Section 5 subjugates a criminal defendant's right to prove his innocence to the free flow of information. Do the provisions in section 5 of the Act conflict with 6th Amendment protections?**

Subsection 5(b) imposes requirements that could infringe on a criminal defendant's constitutional rights, which possibly could include the Sixth Amendment right to compulsory process but more likely would involve the Fifth Amendment right to due process of law. Specifically, the requirement that a criminal defendant demonstrate that "nondisclosure of the information would be contrary to the public interest" [Section 5(b)(4)] is problematic. It could be applied to deny a defendant exculpatory information that could cause a jury to acquit based on a determination that disclosure would impair the future flow of information to journalists. Under such circumstances, operation of the proposed privilege could deny a criminal defendant a fair trial and thus be unconstitutional.

Section 7

10. **Section 7 provides no privilege against a journalist's eyewitness observations *but only if* "a court determines by a preponderance of the evidence that the party seeking to compel disclosure by a preponderance of the evidence that the party seeking to compel disclosure under this section has exhausted reasonable efforts to obtain the information from alternative sources." It seems that this section is not limited to journalists that are engaged in newsgathering activities, but rather that it applies to the journalist merely because of his status as a journalist. How is the free flow of information furthered by mandating that journalists who are direct witnesses to a crime cannot be compelled until all other sources have been reasonably exhausted when there is no newsgathering rationale behind this restriction? What implications does this have on law enforcement?**

Your question identifies a valid concern. Section 7 confers special privileges to journalists even if the information sought is not source information and even if the journalist is not engaged in newsgathering when he learns of the sought information. The section seems to impose burdens on law enforcement efforts to obtain cooperation from journalists in situations that have nothing to do with confidential sources.

11. **Section 7 describes situations when a privilege will not apply. The last sentence of Section 7 states, "If the alleged criminal or tortuous (typo in the Act) conduct is the act of communicating the document or information at issue, this section shall not apply, and a party seeking the information must do so under sections 1 through 6 or sections 8 through 10 of this**

Act.” Therefore, the language “this section shall not apply” actually means that a privilege does apply if the “alleged criminal or tortious conduct is the act of communicating the document or information at issue.” It seems that this language would mean that a tortious or criminal theft of the information would not preclude the journalist from claiming the privilege. Would a journalist still receive a privilege to conceal his source if that source stole classified information from the government? What problems could this bill cause by sanctioning the “free flow of information” even at the cost of national security secrets?

The quoted language appears designed to ensure that a privilege (beyond the Section 7 requirement that the party seeking the information exhaust reasonable efforts to obtain the information from alternative sources) applies if the “alleged criminal or tortious conduct [witnessed or committed by the journalist] is the act of communicating the document or information at issue.” The objective likely is to safeguard journalists who receive and publish information the disclosure of which may be criminal (such as classified or grand jury information).

The last sentence of Section 7 apparently applies without regard to how the person who makes the disclosure to the journalist obtained the information in the first place. Thus, it would seem to apply to sources who had legal access to information leaked to a journalist as well as to sources that obtained the information illegally, such as by theft. Applying the privilege in such instances could make it much more difficult, if not impossible, for the government to identify a person responsible for illegally disclosing information and determine the nature of the security problem, for example, whether there was a theft of information or a breach of confidence by a person entrusted with such information. By impairing that investigative endeavor, the privilege will make it harder for the government to prevent future illegal disclosures by the same source, perhaps at the cost of national security.

Section 8

- 12. Should this bill contain an exception to prevent property crimes? An internet virus could destroy billions of dollar worth of property and ultimately lead to great suffering. Is this scenario worth an exception?**

It would be reasonable to conclude that the prevention of such an outcome outweighs societal interest in protection of journalists' sources from disclosure. But, adding yet another exception to a statutory privilege that already is riddled with exceptions further exacerbates the problem that I identified in my testimony. For a privilege to effectively promote the free flow of information to journalists by enabling them to assure confidentiality to potential sources, it must be an absolute or near absolute privilege.

The proposed privilege is qualified by numerous exceptions, denying journalists the ability to make such assurances. Thus, it imposes significant costs – the loss of reliable and probative evidence in criminal and civil cases – without conferring benefits.

Section 9

- 13. There are many procedural hurdles to obtaining the Section 9 exception to the media privilege, but there are few procedural hurdles to obtaining the exceptions in Section 8. Should national security be an exception within Section 8 instead of its own complicated section? What implications might the additional procedural barriers in Section 9 have?**

The proposed amended version of Section 9 establishes three exceptions to the proposed journalists' privilege: (a) one that applies if disclosure of source information would "assist in preventing . . . an act of terrorism against the United States"; and (b) another that applies if disclosure of source information would "assist in preventing . . . significant specified harm to the national security"; and (c) one that would apply in a criminal investigation or prosecutions of an "unauthorized disclosure of properly classified information by a person with authorized access to such information." The second two exceptions involve balancing tests requiring that courts determine whether "significant specified harm to the national security . . . would outweigh the public interest in newsgathering and maintaining a free flow of information to citizens" and whether "unauthorized disclosure has significantly harmed the national security in a way that is clear and articulable and the harm caused by the unauthorized disclosure of such information outweighs the value to the public of the disclosed information." These and the other procedural barriers in Section 9 will cause inconsistent application of the exceptions based on subjective and unguided determinations by individual federal judges.

- 14. It seems that this provision would prevent the United States from sharing information that could prevent a terrorist attack in Canada, the United Kingdom, or any other country. Why is the executive limited to compelling information to prevent a terror attack only against the United States?**

This limitation appears in the amended version of S. 2831. The legislation does not prohibit information sharing. It limits the government's ability to obtain the information in the first instance. I do not see any good reason for the proposed limitation.

- 15. Section 9 contains two exceptions to the journalist's privilege. The first exception allows the government to pierce the reporter's privilege to discover information that could prevent a terrorist attack. The term "preventing" could be interpreted very narrowly, effectively precluding the**

government from getting information unless the attack was imminent. Could the language "preventing an act of terrorism against the United States" be interpreted by a judge in a manner that would preclude piercing the privilege to apprehend terrorists that are merely planning or preparing for an act of terrorism?

All of the terms and requirements in the proposed legislation, many of which are vague, are subject to judicial interpretation.

16. Under the current version of the Act, would a journalist still receive a privilege to conceal his source if that source stole classified information from the government?

Yes. In fact, one of the exceptions in Section 9, that contained in Section 9(a)(2), seems to permit the government to overcome the privilege only if the leaker has "authorized access" to illegally leaked information, rendering the exception inapplicable if a person steals and then leaks classified information.

17. Why should acts of illegality not be protected with this privilege?

I do not understand this question.

18. What implications does ambiguous language in the bill like "properly classified" raise? The term could be interpreted in at least two ways. First, "properly" could mean that the proper procedures were followed to classify the information. Second, "properly" could mean the policy decision to classify the information could be revisited by a judge that does not agree that the information should be classified. In light of this ambiguity and the implications if a judge were to interpret this word as described in the second example above, should this word be removed from the bill?

Under either interpretation, the bill would require judicial scrutiny of the internal operations of the executive branch and is therefore problematic. (Of course, the interpretation permitting inquiry into the policy decision to classify is more problematic.) Because of the vagueness of the term and the danger of judicial overreaching, it would be advisable to remove the word "properly" in the several places that it appears.

19. Judges decide issues based upon the evidence in front of them. How would judges know what influence disclosure in a particular instance would have on the general free flow of information? What factual information would each side present to allow judges to make such a determination?

This question highlights a fundamental problem with the proposed legislation. Sections 4(b)(5); 5(b)(4); 6(b)(5); and 9(a)(1) and all require judicial assessments of the impact that court-ordered disclosure of source information in an individual case will have on the future flow of information to the news media and then to the public. Federal judges are not qualified to make such predictions. It is not clear how a judge will be able to determine the extent to which an individual disclosure order will become known to potential sources of future news stories who would demand confidentiality in exchange for information, how it will affect those sources, whether they will recall it when they are deciding whether to make a disclosure, and the effect that it will have on the promises that journalists are willing to make to such sources. Because the determination mandated by the proposed legislation requires predictions about future conduct of sources, it is not clear what factual information litigants could present to assist courts in this determination.

20. In Section 9(a)(2) the Act would provide “no privilege ... against disclosure of information... by a person with authorized access to such information....” Would this clause provide a privilege for someone who was not authorized to access the information? If so, would this clause actually allow and encourage some people to disclose national security information?

The clause apparently would make the availability of the privilege hinge on the identity of the target of the criminal investigation or prosecution. Specifically, if the person under investigation had “authorized access” to the improperly leaked information, an exception to the privilege could apply. But, if the person did not have authorized access, the exception could not apply. In either event, the journalist to whom the leak was made would be able to assert the privilege, not the person who had access to and leaked the information.

Note, however, that this exception is problematic in that it often will be unclear who leaked the information and thus whether the leaker had “authorized access.” Thus, it will not be clear whether this exception applies at all. In other words, it will often be the case that the information needed to determine if this exception applies – the identity of the leaker – will be the same information that is unavailable unless and until the journalist is compelled to disclose the identity of his source.

21. How would this bill interact with the powers of the executive?

As noted above, and in my prepared testimony, several requirements in the proposed legislation would involve the courts in Executive Branch decision-making and grand jury investigations.

Section 10

- 22. The reporter and his source only get the benefits of the privilege if the source's information was given in exchange for the reporter's promise of confidentiality. Is there a danger that sources will begin to request this promise, even when it is not strictly necessary to encourage them to reveal their information? Further, could this "promise seeking" dilute the value of the promise and unnecessarily extend the privilege?**

There is no cost to the source to demand a promise of confidentiality and, under the legislation, little or no reason for a journalist not to agree to confidentiality. Thus, it seems likely that a federal journalists' privilege will result in more source requests for confidentiality. It is also worth noting that several recent high-profile cases, like the Miller and Taricani incidents, involved journalists who claimed that a source had demanded confidentiality, when, in fact, the sources either denied making such a demand or claimed to have later waived any confidentiality. Thus, there may be reason to be concerned that the proposed legislation will cause some journalists to claim that a source demanded or still insists on confidentiality when the source has not requested such confidentiality or no longer insists on it.

General Questions

- 23. What provisions of this bill could be unconstitutional?**

As noted above, by permitting courts to deny criminal defendants access to exculpatory information based on a determination that their need for such is outweighed by "the public interest in newsgathering and in maintaining the free flow of information," Section 5(b) risks violating the constitution. The inclusion in the amended version of the proposed legislation the clause permitting courts to consider "the defendant's constitutional rights" as a factor does not remedy this problem. The defendant's constitutional rights should trump considerations of the public interest in the free flow of information, not simply be one of several factors to be considered.

- 24. During the hearing you touched upon two recommendations you had to improve the bill. Please elaborate on those suggestions.**

The present legislation is hopelessly complex. It will not improve the flow of information because it does not enable journalists to give any sort of meaningful assurances to sources who wish to remain anonymous. Instead, it will deny grand juries, prosecutors, courts, criminal defendants, and civil litigants access to probative and reliable information without any resulting benefit other than to confer special rights to journalists.

Nor would an absolute or near absolute privilege, like the one embodied in the predecessor legislation, S. 1419, make sense. The cost in terms of suppressed evidence is simply too great. What is necessary is a simpler privilege that does not impose the same costs.

One possibility is to enact a qualified privilege that does not apply at all to federal grand jury subpoenas and subpoenas issued at the request of the Department of Justice [DOJ]. When there is a request to issue one of these subpoenas (which I will refer to collectively as "DOJ subpoenas") to the news media, even if the subpoena does not demand source information, DOJ employs a rigorous internal review process set out in the Code of Federal Regulations. DOJ subpoenas to the media for source information are very rare (apparently about one per year) and there is no evidence that DOJ has used subpoenas to harass or punish journalists. Simply put, DOJ seems to have limited its use of media subpoenas to situations in which there is good reason to issue them. In fact, DOJ has an interest in exercising self-restraint in this area. If it fails to properly police its own prosecutors, it is likely to trigger a backlash in the form of a broad statutory journalists' privilege. In addition, most of the concerns about the costs of a journalists' privilege – that it will impair law enforcement and threaten national security – would evaporate if the privilege did not apply to DOJ subpoenas.

In contrast, subpoenas from criminal defendants and civil litigants are not subject to any regulation, oversight, or restraint. It is such subpoenas that are more likely to threaten to curtail the free flow of information.

Another possibility is to have a privilege that does not protect at all any disclosures that in and of themselves violate federal law. It seems anomalous for Congress to identify conduct as illegal – such as the disclosure of classified information or grand jury matters – but at the same time enact legislation that makes it difficult, if not impossible, to properly investigate and prosecute violations of those laws.

Questions from Senator Edward Kennedy:

In your testimony, you expressed concerns that in establishing that a person or entity is a "foreign power" or an "agent of a foreign power", the government may be forced to reveal classified information. You pointed out that this result may be avoided by designating the person or entity as a "Specially Designated Global Terrorist".

A. Can you please explain, in detail, why you would have a concern despite existing mechanisms in place to avoid revealing classified information in a court proceeding under seal or under the Classified

Information Procedures Act (18 U.S.C. App) without designating the party as a "Specially Designated Global Terrorist"?

B. Isn't there a greater risk for legal uncertainty if Congress does not follow well-established definitions contained in our national security laws?

Under FISA, an "agent of a foreign power" is a person who, through clandestine intelligence gathering activities, international terrorism, or otherwise, poses a threat to the national security of the United States, or is an employee or agent of a foreign nation. FISA permits the use of electronic surveillance, physical searches, and other techniques to obtain from such persons information relevant or necessary for purposes of shaping foreign policy or safeguarding national security. For FISA to be effective, two kinds of secrecy are necessary. First, the government's identification of a person as an agent of a foreign power and its investigation of that person must remain secret. Otherwise, the person will take steps to evade or frustrate surveillance, flee the country, tamper with evidence, etc. Accordingly, FISA permits the government to keep FISA applications and orders secret and to conduct electronic surveillance and physical searches without giving notice to the target of such investigation. Second, the evidence that the government uses to determine who is an agent of a foreign power, such as confidential source information, signals intelligence, and the like, must remain secret to safeguard sources and methods of information collection.

Use of the "agent of a foreign power" definition as a requirement for an exception to a statutory federal journalist's privilege could undermine both of those kinds of secrecy. In order to take advantage of the exception, the government would be required to assert in court and thus reveal that a particular journalist who had asserted the privilege was an agent of a foreign power. This would preclude effective covert investigation of such a person. In addition, to establish that such an "agent of a foreign power" exception was applicable, the government presumably would have to present evidence in court to demonstrate that the privilege-asserting journalist was indeed an agent of a foreign power, thereby threatening the secrecy of the government's sources and methods of information gathering. Even if the government were permitted to make an *ex parte, in camera* showing of the evidence that supported a determination that a journalist was an agent of a foreign power, or make use of some other type of CIPA-like protection for its underlying evidence, this would not address the problem that the proposed exception would force the government to reveal its determination that a journalist was an agent of a foreign power as defined in FISA.

By requiring the government to disclose a person's status as an agent of a foreign power within the FISA definition in order to overcome a claim of a journalist's privilege, the proposed legislation would put the government between a rock and a hard place:

requiring that it either disclose to the actual or potential target of a FISA search that the government considers him to be an agent of a foreign power, thereby undermining possible FISA investigation, or forgo a claim that the journalist's privilege is inapplicable.

By way of example, suppose that the proposed journalists' privilege, including the FISA-based exception, were to become law. Suppose further that the government had information from confidential sources that a foreign journalist residing in the United States was secretly supplying information to Hezbollah or another foreign terrorist organization, causing the government to conclude that the journalist was an "agent of a foreign power." This determination likely would cause the government to either initiate FISA electronic surveillance or contemplate doing so. Suppose that the journalist then publishes a story based on a leak of classified information. A grand jury issues a subpoena demanding the journalist's testimony about the source of the leak and the journalist asserts the journalists' privilege. If the government has to assert and then demonstrate that the journalist is an "agent of a foreign power" in order to overcome the claim of privilege (as the proposed legislation requires), it will reveal to the journalist that he is a potential target for FISA surveillance or searches and may have to disclose its sources to prove to a court that the exception applies. Alerting the journalist to the government's belief that he is an agent of a foreign power could frustrate FISA-based investigation; disclosing sources in court could jeopardize their safety and undermine their effectiveness.

As I pointed out in my testimony, there are other ways of creating a similar exception to a federal statutory journalist's privilege without jeopardizing potential or actual FISA investigations. As my prepared testimony noted:

A better approach might be to tie the carve-out to the designation of a journalist or media outlet as a "Specially Designated Global Terrorist" [SDGT] under Executive Order 13224, and perhaps include non-designated media outlets that are associated with designated SDGTs. The President, the Secretary of the Treasury, the Secretary of State, and the Attorney General are involved in the process by which persons and entities are designated as SDGTs based on their status as or affiliations with terrorist organizations and terrorists. Because SDGT designations are made public, and can be based on undisclosed classified evidence, use of SDGT status or association with an SDGT as the trigger for the carve-out will not jeopardize classified information or otherwise imperil national security.

The SDGT definition is well-established in our national security law and avoids the above-described problems with use of the FISA-based definition.

The Honorable Arlen Specter
Re: Federal Reporters' Shield Law
November 17, 2006
Page 16

Please feel free to contact me if you have any other questions.

Very truly yours,

Steven D. Clymer
Professor of Law
Cornell Law School