



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

March 21, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find enclosed responses to questions arising from the September 20, 2006, appearance before the Committee of Deputy Attorney General Paul J. McNulty. The subject of the hearing was "Reporters' Shield Legislation: Preserving Effective Federal Law Enforcement." We hope that the information is helpful to the Committee.

Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard A. Hertling".

Richard A. Hertling
Acting Assistant Attorney General

cc: The Honorable Arlen Specter
Ranking Minority Member

**Before the Committee on the Judiciary
United States Senate**

**“Reporters’ Privilege Legislation: Preserving Effective Federal Law Enforcement”
September 20, 2006**

**Responses of Paul J. McNulty
Deputy Attorney General**

Responses to Questions From Senator Kyl:

1. *In the Act, “the term ‘attorney for the United States’ means the Attorney General, any United States Attorney, Department of Justice prosecutor, special prosecutor, or other officer or employee of the United States in the executive branch of Government or any independent regulatory agency with the authority to obtain a subpoena or other compulsory process.” Would ‘attorney for the United States’ include JAG officers? If so, how could this Act negatively impact military tribunals and terror trials? Should an exception exist for terror trials?*

Answer: The term "attorney for the United States," as defined in Section 3(1), encompasses any "officer or employee of the United States in the Executive branch of Government or any independent regulatory agency with the authority to obtain a subpoena or other compulsory process." JAG officers are officers of the United States with authority to obtain subpoenas or other compulsory process and, thus, would appear to constitute "attorney[s] for the United States" under the proposed legislation. *See, e.g.,* 10 U.S.C. § 846 (explaining that "trial counsel, the defense counsel, and the court martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe"); *see also* Rules for Courts Martial (RCM) 701 and 703.

The bill could negatively affect military tribunals and terror trials in several ways. First, because courts martial and other military tribunals do not themselves have authority to prosecute a civilian's noncompliance with their subpoenas as a contempt of court, they must refer such noncompliance cases to the appropriate U.S. Attorney's Office for prosecution in a Federal District Court. *See* 10 U.S.C. § 847. When applied to such a Federal court proceeding, the expansive journalist's privilege created by the bill would pose a substantial obstacle to such enforcement actions and, thus, have a severe negative impact on the referring military tribunals by undercutting their ability to make effective use of compulsory process to obtain relevant testimony and evidence from covered journalists.

The extent of the bill's *direct* impact on courts martial, military commissions, and other military tribunals will depend to a large extent upon whether such tribunals are deemed "Federal court[s]" within the meaning of Sections 4 through 6 of the bill. The prohibitions and restrictions in those sections apply only to compulsory process issued by

"Federal courts," but that term is not defined in the bill. Although the above-noted military tribunals are not Article III courts, it is not clear whether the term "Federal courts" as used in the bill is intended to apply only to Article III courts. To the extent that military tribunals would be deemed Federal courts for purposes of the proposed legislation, the bill would negatively impact such tribunals by restricting the ability of both the prosecution and the defense to obtain testimony or the production of evidence from covered journalists who may have knowledge or evidence critical to a case. As but one example, a reporter may have confidentially obtained information that is relevant to the prosecution of an enemy combatant before a military commission or of a soldier before a General Court Martial. The bill's extensive restrictions upon the Government's or the defense's ability to compel testimony or evidence from the journalist witness would have an adverse impact on a military tribunal's ability to obtain relevant evidence that may be critical to a fair determination of guilt or innocence. The same concerns will apply to "terror trials" to the extent that they are conducted by courts or tribunals that constitute "Federal courts" within the meaning of the bill.

Because the Department does not believe there is justification for any reporter's privilege bill, we are reluctant to endorse particular exceptions, which might imply that a bill with appropriate exceptions is acceptable. In the event that S. 2831 were to be enacted, however, we do not believe it should apply in any situation where the purported journalist's privilege would impose unwarranted obstacles to critical law enforcement or national security objectives, including in the context of trials involving terrorism.

2. *Is there a way to further broaden the list of entities that should not receive the privilege, such as criminal organizations? Are there any publicly available lists that contain this information?*

Answer: The Department assumes that, in referring to the "list of entities" that should not receive the privilege, the question refers to a possible expansion of the existing proposed language to exempt from the definition of journalist "any person who is a 'foreign power' or the 'agent of a foreign power' under section 101 of Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801)." In the event S. 2831 were enacted, the Department believes that the category of entities excluded because they engage in activities adverse to national security or law enforcement, and thus could improperly exploit a journalist's privilege against United States interests, should be substantially expanded. We are not aware of any specific list or lists that would satisfactorily encompass all properly excludable entities. At a minimum, however, persons or entities that fall within categories such as the following should be excluded from any protections or privileges provided by S. 2831, even if they otherwise satisfy the definition of "journalist": Foreign Terrorist Organization (*see* 8 U.S.C. § 1189; 31 C.F.R. pt. 597); Specially Designated Global Terrorist (31 C.F.R. § 594.310); Specially Designated Terrorist (31 C.F.R. § 595.311); Terrorism Exclusion List (*see* 69 Fed. Reg. 23,555 (Apr. 29, 2004)); List of Parties Excluded from Federal Procurement and Nonprocurement Programs (maintained by GSA pursuant to Executive Orders 12549 and 12869). A number of media entities whose reporters, stringers, and cameramen would

otherwise qualify for protection under the bill are presently included on such lists, including the Lebanese Media Group ("LMB"), Al-Manar (Hezbollah satellite television network), and Al-Nour (Hezbollah radio network).

3. *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 from occurring?*

Answer: Congress has made conspiracy a crime in numerous provisions of the Federal Criminal Code. See, e.g., 18 U.S.C. §§ 793(g) (espionage statute); 1951 (Hobbs Act), 2339A (material support to terrorists); 21 U.S.C. § 846 (narcotics). The crime of conspiracy is committed, and thus has occurred, when two persons enter into the proscribed unlawful agreement and, as many statutes require, an overt act is undertaken to further the agreed-upon unlawful objective.

The Section 4 language at issue closely tracks the Department's own guidelines for the issuance of compulsory process to members of the news media, set forth at 28 C.F.R. § 50.10. This similarity between the proposed legislation and the Department's guidelines has led some supporters of S. 2831 to suggest that the bill is no more than a codification of the Department's guidelines. Nothing could be further from the truth.

The Department's guidelines strike an appropriate balance between the public's interest in the free dissemination of ideas and information with the public's interest in effective law enforcement and the fair administration of justice. The guidelines do so while preserving the constitutional prerogatives of the Executive branch with respect to key decisions regarding, for example, the kind of evidence that is presented in grand jury investigations and what constitutes harm to the national security. By contrast, the proposed legislation would shift final authority over these and other quintessentially prosecutorial decisions to the judiciary.

To make matters worse, S. 2831 would replace the inherent flexibility of the Department's guidelines, which can be adapted as circumstances require, with a framework that is at once more rigid (by virtue of being codified) and less predictable (by virtue of being subject to the interpretations of literally hundreds of Federal judges).

The Department has a clear track record of carefully balancing the competing interests of the news media and the public's interest in fair and effective law enforcement. The proposed legislation would upset that balance with serious and negative consequences for law enforcement.

4. *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?*

Answer: The bill’s requirement that the information sought be “critical” to an investigation or prosecution is problematic, not only because of the imprecision of the term but also because, under the proposed legislation, it is a judge and not a prosecutor who ultimately will make the determination about the “criticality” of the information sought. The proposed legislation thus confers upon the judiciary the authority to second guess determinations – including determinations about what evidence is “critical” to an ongoing criminal investigation or prosecution – that rightfully are vested in the Executive branch. At the very least, the bill thrusts the judiciary into decisions that require extensive knowledge of detailed and nuanced national security matters.

Moreover, the bill places the burden upon prosecutors to prove, by a “preponderance of the evidence,” that the information they seek is critical – which would be a dramatic departure from the well-established law governing grand jury subpoenas. Under existing law, an individual wishing to challenge a subpoena bears the burden of proving that the request for particular evidence is unreasonable or oppressive. The bill, by contrast, saddles the Government with the obligation of going into Federal court and producing evidence of a quantity sufficient to prove that the information sought is “critical.” An effective assessment of whether relevant information is “critical,” moreover, often cannot be made at the early stages of an investigation or proceeding. Thus, the bill not only shifts authority over traditional prosecutorial decisions to the judiciary, but also places a thumb on the scale in favor of a reporter’s privilege.

The Department strongly opposes the transfer to the judiciary of this prosecutorial decision-making authority traditionally vested in the executive. The problem with the bill, therefore, is structural, and in the Department’s view cannot be cured by the adoption of different or better standards.

5. *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 4 so that investigators can secure evidence before it is destroyed?*

Answer: While the absence of an exigency exception is certainly troubling, the addition of such an exception would not cure the structural defects in the proposed legislation outlined above. Specifically, under the proposed legislation, determinations rightfully vested in the Executive – including determinations about what evidence is “critical” to an ongoing criminal investigation or prosecution and what constitutes harm to the national security – would be transferred to the judiciary. Worse still, under S. 2831, the government will bear the burden of establishing its need for the information it seeks – a dramatic departure from

existing law, which requires the party resisting a subpoena to prove that the subpoena is unreasonable and oppressive.

One of the hallmarks of the Department's own policies governing the issuance of compulsory process to the media, *see* 28 C.F.R. § 50.10, is the flexibility afforded the Department in times of extreme emergency. The proposed legislation, however, would vitiate that flexibility by shifting final authority over core executive and prosecutorial decisions to the judiciary, and by forcing the government to bear a heavy burden of proof in order to obtain information that is essential to the investigation and prosecution of serious crimes.

6. *The rights of criminal defendants are encompassed in a body of Sixth Amendment law. Section 5 would subjugate 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 Sixth Amendment protections?*

Answer: The restrictions that section 5 would impose upon a criminal defendant's right to obtain compulsory process conflict with the Sixth Amendment.

Before a criminal defendant can obtain testimony or evidence for his defense from a covered journalist under Section 5, he must demonstrate to a court that (1) there are reasonable grounds to believe, *based on an alternative source*, that the information sought is relevant to the determination of guilt, innocence, or sentencing; (2) the defendant has exhausted reasonable alternative sources of the information; (3) the information sought is essential, and not merely "peripheral"; and (4) nondisclosure of the information would be contrary to the public interest, under a balancing formula set forth in the bill.

Although a defendant's Sixth Amendment rights are not absolute, the government bears a heavy burden when it seeks to limit them by statute. *See Ronson v. Commissioner of Correction*, 604 F.2d 176, 178 (2d Cir. 1979). The detailed standards that must be satisfied under Section 5 before a defendant can obtain the information he needs for his defense are substantially more demanding than the minimal limitations that courts have held are compatible with Sixth Amendment rights. *See, e.g., United States v. Criden*, 633 F.2d 346, 358-59 (3d Cir. 1980) (requiring the challenging party to show only that he had tried and failed to obtain the information from alternative sources and that the information was "crucial to the claim"; privilege claim rejected and testimony compelled). As one court recently described the proper balance to be struck between the journalist's privilege and a defendant's Sixth Amendment rights: 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. Lindh*, 210 F.Supp.2d 780, 782 (E.D. Va. 2002) (emphasis added).

Thus, Sixth Amendment rights may not properly be denied merely because a defendant cannot prove to a court that the information he seeks is "essential"; that the relevance of the information sought is based on grounds provided solely by an "alternative source"; or that nondisclosure of that information "would be contrary to the public interest," taking into account "the public interest in newsgathering and maintaining the free flow of information," as required by the bill. Because Section 5, in fact, imposes such excessive requirements, it conflicts with the Sixth Amendment rights of defendants.

7. *The bill provides that there is no privilege against information "reasonably necessary to stop, prevent, or mitigate" a specific case of death, kidnapping, or substantial bodily harm. Is a general or random threat of death less worthy of police protection? Why shouldn't law enforcement be able to get information to apprehend a person suspected of having committed death, kidnapping, or substantial bodily harm?*

Answer: The bill's requirement that the government demonstrate that the information sought is "reasonably necessary to stop, prevent, or mitigate" a "specific" case of death, kidnapping, or substantial bodily harm – a requirement that is echoed in Section 9's requirement that the government show a "clear and articulable" harm to the national security – imposes a significantly higher burden upon the government than exists under current case law, and vests final authority over such determinations in the hands of the judiciary rather than the Executive branch. In so doing, the bill would severely impair the flexibility of the Executive branch in enforcing Federal law, both by imposing rigid mandatory standards in lieu of existing voluntary ones, and by applying its restrictions on the use of compulsory process more broadly than the existing Department policies.

In attempting to prevent the crimes identified in Section 8 – death, kidnapping, and substantial bodily harm – law enforcement officials often must take action in response to general and random threats. Indeed, by the time a threat becomes "specific," it may be too late for law enforcement officials to disrupt it. The use of the word "specific" in the text of the proposal could result in serious consequences if it remains and is interpreted in the manner suggested by the question.

The Department believes that law enforcement should not be precluded from obtaining information from a journalist in order to apprehend a person suspected of having committed death, kidnapping, or substantial bodily harm. The government conceivably could obtain such information under Section 4, but only if a court finds that it has satisfied numerous conditions and that the disclosure of the information serves the public interest. The government should not be restricted by a journalist's privilege in obtaining information that is reasonably necessary to apprehend perpetrators of these serious crimes.

Regardless of the language used in Section 8, it remains the view of the Department that existing case law and Department policy have reached appropriate balance between the paramount public interest in preventing and prosecuting serious crimes and the media's right to gather and report the news. The proposed legislation would upset this balance with

dramatic results for law enforcement and, consequently, the safety of the American people. For these reasons, the Department continues to oppose the proposed legislation.

8. *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 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?*

Answer: According to the Department's interpretation of Section 7, journalists would be exempt from providing eyewitness observations of criminal conduct only in cases in which the journalist was acting in a professional newsgathering capacity and the information would identify a source who provided information under a promise or agreement of confidentiality, or the information sought was provided pursuant to a confidentiality agreement. Therefore, if a journalist witnessed a hit-and-run accident while walking to lunch or on assignment, the privilege would not apply because the journalist's eyewitness observation of that particular criminal conduct would not identify a source or violate a confidentiality agreement obtained while acting in a professional capacity.

Nonetheless, Section 7 would impose unacceptable restrictions upon the government's ability to enforce the laws and protect national security. Particularly concerning is the fact that the exception from the privilege for crimes witnessed by journalists does not apply "[i]f the alleged criminal or tortuous [sic] conduct is the act of communicating the documents or information at issue." Therefore, if the crime or tort at issue were the disclosure of information to the journalist (e.g., an unlawful leak of classified information to a reporter), the privilege would attach and the journalist would not have to disclose his or her source unless the government satisfied the requirements of Section 4. This exception would virtually immunize a journalist from performing the civic duty of serving as a witness to a crime that other citizens would be required to perform. Even the more highly recognized and protected attorney-client privilege does not apply when the attorney participates in the crime. This exception for "disclosure" crimes would especially hinder investigations of leaks of classified information and, in fact, may encourage such leaks to occur.

9. *Section 7 describes situations when a privilege will not apply. The last sentence of Section 7 states, "If the alleged criminal or tortuous [sic] 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 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?

Answer: The Department agrees that the proposed legislation, by its terms, appears to provide a privilege to the reporter in instances in which the alleged crime being investigated is “the act of communicating the documents or information at issue.” Thus, in any criminal investigation into a leak of classified information to a covered journalist, the government would be required to make a showing sufficient to overcome the reporter’s privilege conferred by the bill.

The showing that the bill requires the government to make in order to overcome the reporter’s privilege is excessive – even in a case involving a leak of classified information. Under Section 9, for example, a court must determine “by a preponderance of the evidence” that “an unauthorized disclosure [of classified information] has significantly harmed the national security in a way that is clear and articulable” and that such harm “outweighs the value to the public of the disclosed information.”

The bill thus not only transfers to the judiciary the authority to second-guess the Executive branch’s determinations regarding what does and does not harm the national security, it also empowers courts to find that a reporter’s promise to conceal a source’s identity can override national security interests, even when harm to national security is conceded. In so doing, Section 9 would force Federal judges to make very difficult decisions about the national security implications of a particular leak. While the members of the judiciary are talented and skilled, they lack the expertise and information to make such determinations, and requiring them to do so would necessarily immerse judges into nuanced considerations of national security matters. These considerations would be occurring in environments in which time is of the essence and national security threats are constantly changing.

In addition to these structural problems, the proposed legislation could seriously compromise national security by allowing those with access to the most sensitive classified information to hide behind the reporter’s privilege and leak with virtual impunity. Judge Wilkinson identified the problem almost 20 years ago in his concurring opinion in *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988), in which he noted that according reporters a privilege against disclosing confidential sources “would install every government worker with access to classified information as a veritable satrap. Vital decisions and expensive programs set in motion by elected representatives would be subject to summary derailment at the pleasure of one disgruntled employee.” *Id.* at 1083. The bill’s practical effects would be no different, and the potential harm it poses to national security is enormous.

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

Answer: The bill's failure to provide a property crimes exception is a glaring omission. As the question indicates, certain property crimes – including property crimes committed by terrorist groups both foreign and domestic – could result in massive financial harm and human suffering, and still may not meet the stringent requirements set forth in the bill for overcoming a reporter's privilege. Yet while the absence of an exception for property crimes is certainly troubling, the Department does not believe that the addition of such an exception would cure the structural defects of the proposed bill.

11. *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?*

Answer: The Department believes that the structural defects inherent in S. 2831, as set forth in detail above, are so serious that they could not be cured merely by inserting a national security exception into Section 8. As explained above, S. 2831 would shift to the Federal judiciary key decisions that traditionally have been reserved to the Executive branch. Moreover, S. 2831 would replace the inherent flexibility of the Department's media subpoena guidelines with a more rigid statutory structure. These deficiencies, in the Department's view, cannot be cured by subsuming the national security exception in Section 9 into the general exceptions set forth in Section 8.

12. *It seems that Section 9 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?*

Answer: The Department finds problematic S. 2831's apparent limitation of the national security exception in Section 9 to cases in which disclosure of information would assist in preventing an act of terrorism against the United States only, as opposed to acts of terrorism against other countries. In the ongoing war on terror, threats are not restricted to any particular nation. Indeed, the United States regularly works closely with our allies on an array of counter terrorism activities, and the Department opposes provisions that could constrain our ability to share information with those allies concerning a potential or actual act of terrorism.

13. *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?

Answer: Although we believe that the better reading of this provision would permit piercing the reporter’s privilege to apprehend terrorists who are planning or preparing for an act of terrorism, we agree that the term could be susceptible to other interpretations. We emphasize that the potential for ambiguity in interpreting this provision is just one among many problematic aspects of S. 2831. The bill significantly increases the burden that the government must meet to obtain certain information from members of the news media, thereby impairing the Department’s ability to investigate and prosecute serious crimes. The Department opposes the bill, apart from the other reasons stated, on the basis of the structural concerns explained above.

14. *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.*

Answer: Section 9’s reference to “properly classified” information is troublesome for the reasons of imprecision suggested in the question. As the question states, the language could arguably be read to authorize the judiciary to determine whether information in fact was “properly” classified under the principles governing such decisions. The potential for second-guessing or judicial override infringes upon the authority vested in the President by Article II of the Constitution. *See generally Department of Navy v. Egan*, 484 U.S. 518, 527 (1988) (acknowledging the compelling nature of the President’s constitutional authority to classify and control access to information bearing on the national security). The Department believes that such decisions are best made within the Executive branch.

15. *If another situation were to arise similar to the London Bomb Plot, are the requirements of “notice and an opportunity to be heard” reasonable without an exigency exception?*

Answer: The process contemplated by the proposed legislation – in which the reporter must be afforded notice and an opportunity to be heard, and a court makes the final determination about what constitutes harm to the national security – will undermine law enforcement’s ability to move quickly against terrorist plots like the London bomb plot. An exigency

exception would certainly be an improvement; however, the addition of such an exception will not solve the larger structural problems with the bill.

The example I provided in my written testimony to the Committee underscores these flaws. In that hypothetical, a journalist publishes a detailed story about a classified covert effort to track the movements of international terrorists, and attributes the information to a confidential source. The source is described as a government insider who is concerned about the program because it has, in his view, encroached on the privacy rights of certain individuals by erroneously identifying them as terrorists. The story further reveals that the government insider is so disgruntled that he intends to resign and relocate outside the United States, taking with him classified documents detailing this and other classified programs.

In such a case, time is clearly of the essence, and under current Department policy, the Attorney General can quickly approve a subpoena. Even if the journalist resisted the subpoena in court, he or she would be required, under current law, to show that the subpoena was unreasonable and oppressive – a very high standard, indeed, and one the journalist is unlikely to meet under these circumstances.

Under the proposed legislation, however, if the reporter resisted the subpoena in court, *the Department* would bear the burden of providing affirmative proof that the leak damaged the national security. Even if the Department made such a showing, under the proposed legislation a court could still determine that the public's interest in learning about the covert program outweighed the government's interest in identifying the leaker, and quash the subpoena on that basis.

While the obstacles that S. 2831 places in the path of law enforcement are perhaps more apparent in cases involving exigent circumstances, they are not limited to such cases. Accordingly, it remains the Department's view that merely providing for an exception to the privilege in such circumstances would be insufficient to remedy the flaws of S. 2831.

16. *Should the executive have the ability to get information regarding threats to our country, such as terrorist information generally, and not just "an act of terrorism"?*

Answer: The Executive branch should be permitted to use all tools consistent with the Constitution and laws of this country to collect information about threats to our country. The Department believes that its current policies and controlling case law properly balance the public's interest in preventing and prosecuting terrorist activity and the public's interest in the gathering and reporting of news by the media. As set forth in more detail above, S. 2831 would make it significantly more difficult for the government to obtain information about threats to our national security than under current laws and policies, which have served us well in the past, and such a change is not warranted. As I stressed in my written and oral testimony, the Department has very rarely authorized subpoenas to members of the news media; our record is one of restraint, and we turn to the media for source information only after carefully applying our guidelines and only as a measure of last resort.

17. *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?*

Answer: Under Sections 4, 5, 6, and 9 of the bill, in order to compel the disclosure of information from a journalist, a court must find by a preponderance of the evidence, *inter alia*, that “nondisclosure of the information would be contrary to the public interest . . . taking into account . . . the public interest . . . in maintaining the free flow of information.” In other words, the party seeking disclosure of the information – the government – has an obligation to provide evidence that the disclosure is in the public interest. At the same time, however, there is no corresponding factual inquiry that a court could conduct to ascertain the empirical impact that a particular disclosure of information would have on the “free flow of information.” Judges will therefore have little choice but to base their decisions on their own subjective sensibilities and predilections, not evidence. Thus, even if the government is able to provide overwhelming evidence that disclosure of information would be in the public interest to thwart a terrorist attack, a judge would still have discretion to decide that the disclosure does not outweigh the potentially adverse impact it may have on the free flow of information. Moreover, the unpredictability that would arise from having a judge speculate about the result of a disclosure on the “free flow of information” will result in inconsistent judgments and undermine one of the purported justifications for this bill – the perceived need for uniform application of the journalist privilege. Accordingly, and in addition to our other structural objections, the Department opposes the judicial balancing test mandated by S. 2831.

18. *What does “harm national security in a clear and articulable way” mean? Does this clause mean that the free flow of information trumps all other interests except concrete proof of a massive national security crisis?*

Answer: The ambiguity in Section 9’s requirement that the government show a “clear and articulable” harm to the national security as a prerequisite to pierce the reporter’s privilege could lead to the troublesome interpretation suggested in the question. This requirement – like the requirement in Section 8 that the information sought be “reasonably necessary to stop, prevent, or mitigate” a “specific” case of death, kidnapping, or substantial bodily harm – imposes a significantly higher burden upon the government than does current case law and the Department’s own policies.

As I stressed in my testimony, as well as in the above answers, the Department’s guidelines for the issuance of compulsory process to members of the news media strike a workable and appropriate balance between the public’s interest in the free dissemination of ideas and information and its interest in effective law enforcement and the fair administration of justice. Section 9, and indeed the bill as a whole, would replace these guidelines, which

have worked well in the past, with a system that is both more rigid and less predictable. We oppose such a change.

19. *Leaked information could harm national security years after its theft. How would a judge be able to determine what information can be leaked without harming national security?*

Answer: As the Department has repeatedly stressed, one of the fundamental defects of S. 2831 is that it could be construed to give the judiciary the authority to make determinations that traditionally have been vested in the Executive branch – including what information should be classified because its disclosure could harm the national security. *See Department of Navy v. Egan*, 484 U.S. 518, 527 (1988). In the Department’s view, judgments about what disclosures would harm the national security are best and most efficiently handled within the Executive branch, which has extensive and nuanced knowledge about, and experience with, our broader national security strategy and the details of particular classified programs. Judge Wilkinson stressed this same point in his concurring opinion in the *Morison* case. *See United States v. Morison*, 844 F.2d 1057, 1083 (4th Cir. 1988) (Wilkinson, J., concurring). The Department’s current guidelines and the case law in this area preserve the Executive’s key role in such determinations.

20. *What is “specific harm”? What degree of specificity would be required before the government’s interest outweighs the privilege?*

Answer: As the question indicates, Section 9 of the proposed legislation would require the government to demonstrate that the information sought would “assist in preventing (A) an act of terrorism against the United States, or (B) significant specified harm to the national security that would outweigh the public interest in newsgathering,” in order to overcome the reporter’s privilege. This provision is replete with problems and the difficulty of determining what constitutes specific harm to the national security is but one example.

More problematic than the imprecision of the term “specific harm” – or the difficulty of determining the quantum of proof needed to overcome the privilege – is the fact that the proposed legislation vests final authority over these determinations in the judiciary rather than the Executive. In doing so, S. 2831 would contravene not only long-established custom and practice, but also the Constitution itself, which reserves to the Executive, and not to the Judiciary, determinations regarding the nature and degree of harm to the 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 security.” *New York Times Co. v. United States*, 403 U.S. 713, 729-30 (Stewart, J., concurring).

21. *Does the lack of a blanket exigency exception to this bill concern the DOJ? What provision does this bill make for emergency situations when the government does not have time to engage in a lengthy court procedure?*

Answer: As stated above in our answer to Question 5, the absence of an exigency exception or some other means of handling emergency situations marks a grave deficiency with the bill and is extremely troubling to the Department. The Department's concerns run deeper, however, and we do not believe that the addition of an exigency exception would cure the structural defects described above and in my written and oral testimony. Accordingly, the Department continues to strongly oppose the bill in its entirety.

22. *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?*

Answer: The Department agrees that Section 9(a)(2) would appear to apply in cases in which classified information was disclosed by a person without authorized access to that information. Drafting the bill in this manner implicitly encourages leaking of classified information by conferring post-disclosure protection upon an individual without authorized access to the information at issue. Indeed, under this formulation it is conceivable that an official with authorized access to classified information could intentionally provide such information to someone without authorized access. That person, in turn, could disclose the unauthorized information to a journalist and enjoy the full protection of the privilege. Of course, Section 9(a)(2) is defective in another practical way. It seems inconceivable that a court could determine whether a source had authorized access to classified information -- and thus is protected from having his or her identity revealed -- without first knowing the source's identity.

In addition to these defects, Section 9's "national security" exception places impermissible burdens on the constitutional responsibilities of the President and the Executive branch. For the government to obtain information under Section 9, a court must determine by a preponderance of the evidence that the leak 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." The Department strongly believes, and courts have agreed, that the judiciary is ill-equipped to make judgments concerning national security determinations made by the Executive branch. *See Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial. . . . They are decisions 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."); *see also United States v. Morison*, 844 F.2d 1057, 1083 (4th Cir. 1988) (Wilkinson, J., concurring).

Moreover, and as stressed above, requiring the government to demonstrate “clear and articulable” harm to the national security poses difficult problems of proof, as the information needed to make such a showing may be highly sensitive or classified and thus not appropriate for disclosure in court.

23. *What suggestions would you make to fix the bill? Please feel free to include comments or observations you think are relevant for Congress to consider.*

Answer: The Department strongly opposes S. 2831. We have detailed our concerns in our letter of June 20, 2006, and in the testimony of at least three Department officials, including myself. Our structural objections to the bill, which I have explained at length in my testimony and in my answers above, leave the Department unable to propose any potential “fixes” to the bill. Put differently, the Department objects to S. 2831 in its entirety and does not believe that modifications, whether along the lines suggested in particular questions or otherwise, would be sufficient to cure the bill’s structural deficiencies.

Responses to Questions from Senator Leahy:

1. *The Justice Department has argued repeatedly that no reporters’ shield legislation is necessary because the Department has exercised restraint in seeking confidential source information from journalists. However, the Department’s own figures appear to belie that assertion. During the hearing, you testified that in the past 15 years, the Attorney General has approved “only approximately 13” requests for media subpoenas that implicated source information. But, in November 2001, in response to inquiries by Senator Grassley, the Department wrote that from January 1, 1991, to September 6, 2001, the Department authorized at least 88 subpoenas to members of the news media, of which 17 sought information involving a reporter’s confidential source. Moreover, this figure apparently did not include subpoenas issued by special prosecutors, or subpoenas issued post-9/11 – such as the subpoenas issued to reporters in connection with the Valerie Plame leak investigation, or the Barry Bonds/BALCO leak investigation.*

- A. *How do you explain the apparent discrepancy in the Department’s statistics?*

Answer: The written statement I submitted to the Committee contained an error as to the number of source-related subpoenas the Attorney General has approved since 1991. My oral statement at the hearing that the Attorney General has approved “less than 20” source-related subpoenas since 1991 corrected the written statement. In fact, our records show that the Attorney General approved issuance of subpoenas for information implicating source information to members of the media in approximately 19 matters since 1991. Of those 19, 17 were listed in the November 2001 letter to Senator Grassley. The remaining two matters include the BALCO case in the Northern District of California in 2006 and an investigation

of the unlawful funding of terrorism in the Northern District of Illinois in 2004. These numbers do not include subpoenas issued by the special counsel in the Valerie Plame investigation.

B. *Please state how many requests for media subpoenas the Attorney General has approved since 2001, and state how many of these requests implicated confidential source information.*

Answer: Since September 6, 2001, the end date for the period covered in the letter to Senator Grassley that you reference, the Attorney General has authorized the issuance of subpoenas to members of the media in approximately 55 matters. He has done so in approximately 65 matters since January 2001. Two of the matters implicated source information, as detailed in A above.

2. *In your written testimony, you stated that the Department's guidelines for dealing with the media are "flexible" and "can be adapted as circumstances require," while the proposed reporters' shield legislation is "more rigid." Yet, the proposed legislation is modeled on the Department's own internal guidelines. Are there any substantive ways in which the reporters' shield bill deviates from the Department's guidelines? If so, please explain these deviations.*

Answer: There are numerous ways in which S. 2831 would differ substantively and critically from the Department's guidelines. The guidelines are a set of agency policies and principles, unenforceable by their own terms, *see* 28 C.F.R. § 50.10(n), and amendable by the Attorney General as need and circumstances may require. *See In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1152 (D.C. Cir. 2006) (explaining that the guidelines "exist to guide the Department's exercise of its discretion" and "create no enforceable right"). They may be promptly and conclusively applied by the Attorney General subject to the requirements of other Executive branch prerogatives, such as national security. Most of their substantive provisions are cast in *precatory* rather than mandatory terms (i.e., "should" rather than "shall"). *See id.* § 50.10(f)(1)-(6). In sharp contrast, the proposed legislation would impose permanent, binding, and inflexible statutory requirements enforceable by the differing interpretations of hundreds of Federal district and appellate judges, and disagreements regarding the legislation's application would be subject to complex, costly, and time-consuming litigation.

Whereas the guidelines impose no restrictions upon a criminal defendant's right to obtain relevant testimony and evidence from journalists, S. 2831 does impose such restrictions, raising serious potential conflicts with the Sixth Amendment. In addition, whereas the guidelines are inapplicable to civil litigation between private parties (e.g., libel actions), S. 2831 is applicable to such private civil actions. Furthermore, the guidelines currently apply only to *attorneys of the Department of Justice*, whereas S. 2831 would apply far more expansively to any Executive branch officer of the United States who has authority to obtain compulsory process.

Other substantive differences also exist and warrant emphasis. S. 2831 prohibits compelled disclosure of covered information unless the Government can persuade a court that "nondisclosure of the information would be contrary to the public interest." The guidelines contain no such prohibition. They merely include the general principle to strike a "proper balance" between the public interest in the free dissemination of information and the public's interest in effective law enforcement. Section 4(b)(2) of the proposed legislation prohibits compelled disclosure unless the Government can demonstrate to a court that "the attorney for the United States has *exhausted* reasonable alternative sources of the information." The guidelines contain no such prohibition. They merely provide that "[t]he government should have unsuccessfully attempted to obtain the information from alternative nonmedia sources."

In short, the Department firmly opposes the view that enactment of S. 2831 would simply mark a codification of the Department's own guidelines.

3. *Last week, two journalists for the San Francisco Chronicle were sentenced to 18 months in jail for refusing to reveal their confidential sources to federal prosecutors in the Barry Bonds/BALCO investigation. It is undisputed that the reporting by these investigative journalists served the public interest, by exposing the prevalence of steroid use among major league baseball players. It is also undisputed that, in reporting this story, neither journalist violated the law. Unless the sentence is overturned on appeal, these journalists could spend more time in jail than the individual(s) who actually leaked the information about the investigation to the press in the this case. Given this, please explain the public interest that is being served by the jailing of these investigative journalists.*

Answer: I would like to emphasize, at the outset, that the Department recognizes that journalists play a vital role in our society by investigating and reporting the news, which is why the Department's own policy governing the issuance of compulsory process to the news media, set forth at 28 C.F.R. § 50.10, 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."

Important though the work of the news media is, no less an authority than the United States Supreme Court has held that there is "no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override 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 criminal trial." *Branzburg v. Hayes*, 408 U.S. 665, 690-91 (1972).

When the Department takes the rare step of issuing a grand jury subpoena to a reporter, we have one goal in mind: to obtain information in the reporter's possession that is

critical to the investigation of serious crimes. Let me also stress another point. The seriousness of leaks of grand jury information cannot be overstated. All individuals who testify before or otherwise participate in the grand jury rely on the secrecy of the grand jury's deliberations. Breaches of that secrecy – in the form of unlawful leaks of grand jury information – seriously imperil the grand jury's ability to investigate and uncover crime, and the Department treats such breaches with extraordinary seriousness.

If a reporter decides to defy both a lawfully issued grand jury subpoena and a subsequent court order to testify, and ends up in jail on a charge of contempt, that is not the Department's goal or desire. Our only goal in these situations is to investigate and prosecute a very serious crime – a public interest that the Supreme Court has held overrides even the substantial interest of the news media in gathering and reporting the news.

Because the Department of Justice takes the decision to issue grand jury subpoenas to members of the news media very seriously – and takes such an investigative step only rarely – we also continuously evaluate whether the subpoenas we issue to the news media are still necessary to the fair administration of justice. For the reasons set out below, the Department has withdrawn the subpoenas issued to the San Francisco Chronicle reporters.

The criminal investigation in which the subpoenas were issued to Messrs. Fainaru-Wada and Williams was an important one. The investigation into the unlawful disclosure of Grand Jury transcripts arose from the underlying prosecution of several defendants associated with the Bay Area Laboratory Cooperative ("BALCO"), captioned *United States v. Conte, et al.* In the underlying criminal prosecution, the Department of Justice prosecutors handling the matter produced copies of the Grand Jury transcripts at issue as part of their discovery obligations. As you know, the Grand Jury testimony in that matter was extremely sensitive. Thereafter, transcripts of this testimony were unlawfully disclosed to Messrs. Fainaru-Wada and Williams and verbatim quotes from those Grand Jury transcripts were published in the San Francisco Chronicle. It is also critical to note that, in June 2004, the Department of Justice was ordered by the federal judge presiding over the *Conte* case, the Honorable Susan Illston, to conduct an investigation into the unlawful disclosure of those transcripts. The Department complied with Judge Illston's Order and initiated an investigation into this matter.

All of the parties who had received copies of the transcripts submitted Declarations to the Court in which they swore, subject to the penalties of perjury, that they had not improperly disclosed the Grand Jury transcripts. Thus, while the unlawful disclosure of the Grand Jury transcripts constituted, *inter alia*, criminal contempt, in violation of Title 18, United States Code, Section 401(3), it was also clear at the time the investigation was initiated that numerous other crimes had likely been committed, including, but not limited to, perjury, obstruction of justice, and making false declarations before a Court, in violation of Title 18, United States Code, Sections 1621(2), 1512, and 1623(a). Indeed, in its opinion upholding the validity of the subpoenas to the Chronicle reporters, the District Court noted that the information sought was "central to the determination of whether the leaker(s) may or

may not have committed perjury, may or may not have sought to obstruct justice, may or may not have violated Federal Rule of Criminal Procedure 6(e), and may or may not have violated the provisions of the Protective Order.” *In re Grand Jury Subpoenas*, 438 F. Supp. 2d 1111, 1118 (N.D. Cal.).

Because this criminal investigation concerned the unlawful disclosure of Grand Jury transcripts, I further note that the United States Supreme Court has consistently emphasized the importance of Grand Jury secrecy to the fair administration of justice. For example, in *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979), the Supreme Court

noted several distinct interests served by safeguarding the confidentiality of grand jury proceedings. First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

Douglas Oil Co., 441 U.S. at 218-219. In later cases, the Supreme Court has again echoed that “[g]rand jury secrecy ... is ‘as important for the protection of the innocent as for the pursuit of the guilty’ ... [and] [b]oth Congress and this Court have consistently stood ready to defend it against unwarranted intrusion.” *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 424 (1983) (citations omitted).

After the Department exhausted all avenues of investigation and the Grand Jury subpoenas were issued to Messrs. Fainaru-Wada and Williams, a confidential informant came forward and identified attorney Troy Ellerman, who previously represented one of the defendants in the *Conte* case, as the individual who leaked the Grand Jury transcripts to Messrs. Fainaru-Wada and Williams. As you may know, on February 15, 2007, Mr. Ellerman pled guilty to two counts of contempt of court, one count of obstruction of justice, and one count of filing a false declaration with a federal court. All four counts are felonies which relate directly to the fair administration of justice. Pursuant to the terms of the plea agreement, Mr. Ellerman faces up to two years in prison for these offenses.

On the same day Mr. Ellerman entered his guilty plea, the Department also withdrew the Grand Jury subpoenas that had been previously served on Messrs. Fainaru-Wada and Williams. The withdrawal of those subpoenas means that the United States Court of Appeals for the Ninth Circuit will not have to consider the District Court’s decision upholding the subpoenas at issue and that Messrs. Fainaru-Wada and Williams no longer face the prospect of contempt of court and possible imprisonment.

The Department has conducted this investigation in a manner that we believe is consistent with our Constitutional obligations, the interests of justice, the Department's guidelines concerning the issuance of Grand Jury subpoenas to the media, and our responsibilities to the Court and the public. Our decision to issue the Grand Jury subpoenas at issue was upheld by the District Court. In a leak investigation, like this one, the Department continuously evaluates whether the information sought by the media subpoena is necessary to the full and fair resolution of the criminal investigation and is willing to withdraw the subpoena, as we did in this case, when it is no longer necessary to the fair administration of justice.

4. *According to press reports, the San Francisco Chronicle journalists involved in the Barry Bonds/BALCO investigation will go to jail rather than reveal their confidential sources. As a result, it appears that the Department may never obtain this information from these reporters.*
 - A. *How many man hours and investigative resources did the Department use to pursue the reporters involved in this leak investigation?*
 - B. *What, if any, other investigative steps did the Department undertake to determine the identity of the leaker in this case?*

Answer: As an initial matter, I would dispute the assertion that the Department “pursue[d] the reporters involved in this leak investigation.” In this investigation, like all cases involving the leak of confidential grand jury information, the Department’s primary goal throughout was to identify and prosecute the leaker, not the journalists who received the leaked information. Furthermore, the issuance of compulsory process to the journalists in this case – as in all such cases – was subject to the Department’s policy set forth at 28 C.F.R. § 50.10. As part of that policy, the prosecutors in this case were required to demonstrate that they had “unsuccessfully attempted to obtain the information from alternative nonmedia sources.” 28 C.F.R. § 50.10 (f)(3). At the time the subpoena was issued to the *Chronicle* reporters, all persons with potential access to the transcripts had submitted sworn declarations to the court denying any involvement in or knowledge of the dissemination of the transcripts, and there was no known nonmedia source who had firsthand knowledge of the leaker’s identity (other than the leaker himself). It was only well after the subpoena had issued that a confidential informant came forward claiming knowledge of the leaker’s identity. Upon learning this information, the Department took immediate action that, as noted above, culminated in the identification and prosecution of Troy Ellerman and the withdrawal of the subpoenas to the *Chronicle* reporters.

Finally, it should be emphasized anew that the Department takes crimes such as this very seriously, devoting the resources necessary to investigate thoroughly and, where appropriate, initiate prosecution.

Response to Question From Senator Kennedy:

1. *Please respond to the testimony of these two witnesses on whether the bill would provide uniformity and standards for federal court rulings on cases involving journalists trying to protect a confidential source.*

Answer: The proposed legislation would not provide uniform standards governing Federal court cases involving the assertion of a journalist's privilege.

S. 2831 provides only a non-constitutional statutory standard that must be satisfied, *at a minimum*, in order for the Government, a criminal defendant, or parties in civil litigation to obtain testimony or evidence subject to a claimed journalist's privilege in Federal court proceedings. It does nothing, however, to prevent Federal courts in different circuits from imposing *more exacting standards*, and adopting *broad* definitions of a journalist's privilege, where their interpretations purport to be based upon the constitutional requirements of the First Amendment. *See generally McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003) (summarizing cases applying a First Amendment reporter's privilege "though they do not agree on its scope").

Thus, Federal courts will remain free to issue opinions framing and applying divergent interpretations of a *constitutional* journalist's privilege, notwithstanding anything in the proposed legislation. In other words, although S. 2831 will provide a minimum "floor" of statutory protection for the particular category of journalists it covers, it provides no "ceiling" whatsoever upon expansive and diverse constitutional interpretations that have been and will be issued in the different Federal circuits. This fact is conceded by supporters of the proposed legislation. *See* Reporters Committee for Freedom of the Press, The Free Flow of Information Act of 2006 ("By its very terms, this bill does not eliminate any of the existing protections defined by courts or state legislatures for confidential or non-confidential sources or materials.") (available at http://www.rcfp.org/shields_and_subpoenas/specter.html).

S. 2831's inability to establish uniform standards is illustrated by considering the very basic issue of defining the class of journalists who would be covered by the privilege. Although the proposed legislation attempts to provide a uniform definition of covered "journalists," that definition will not be binding upon courts applying a journalist's privilege *based upon the First Amendment*. A statute cannot restrict the scope of a constitutional right. Federal courts have articulated widely divergent interpretations of the persons and entities entitled to invoke a journalist's privilege based upon the First Amendment. *See, e.g., In re Madden*, 151 F.3d 125, 130 (3d Cir. 1998) (holding that "individuals are journalists when engaged in investigative reporting, gathering news, and have the intent at the beginning of the news-gathering process to disseminate this information to the public"); *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993) (book author held covered by constitutional journalist's privilege); *von Bulow v. von Bulow*, 811 F.2d 136, 144-45 (2d Cir. 1987) (broadly interpreting scope of constitutional journalist's privilege to extend to those "not traditionally

associated with the institutionalized press," including "lecturers, political pollsters, novelists, academic researchers, and dramatists"); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436-37 (10th Cir. 1977) (fact that film maker was not a salaried newspaper reporter did not deprive him of right to invoke journalist's privilege). In short, S. 2831 will not even provide uniformity or consistency for the Department in making the threshold determination as to whether a person constitutes a journalist who may invoke some form of legally recognized privilege, let alone in applying the widely divergent applications and limitations of such a constitutional privilege. *See generally McKevitt*, 339 F.3d at 532.

Moreover, even the minimum statutory standards that are established by the proposed legislation are riddled with subjective and malleable provisions that will inevitably result in divergent judicial interpretations. As but one example, courts in different Federal circuits can be expected to differ widely in determining whether nondisclosure of information sought by the government will be "contrary to the public interest" under the entirely nebulous formula provided under Section 4(b)(5) of the bill.