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VIA E-MAIL AND FIRST CLASS MAIL

Mr. Barr Huefner
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

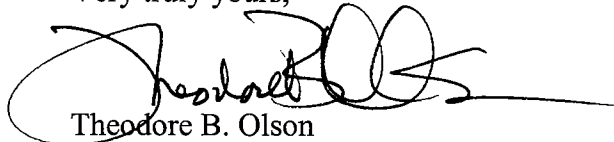
Dear Mr. Huefner:

It was my pleasure to appear before the Senate Judiciary Committee to testify in favor of the Free Flow of Information Act of 2006.

In response to Chairman Specter's request, enclosed please find my written answers to the additional questions posed by Committee members.

Please contact me if I can be of further service.

Very truly yours,



Theodore B. Olson

TBO/tdl

Enclosure(s)

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**RESPONSE OF THEODORE B. OLSON TO ADDITIONAL QUESTIONS
FROM MEMBERS OF THE SENATE JUDICIARY COMMITTEE**

1. Based on your experience, do you think that the language of the bill is sufficient to establish that a reporter is entitled to the privilege?

The text of the Free Flow of Information Act of 2006 clearly establishes that reporters are entitled to a privilege against disclosure of their confidential sources or of material given to them in confidence. And it plainly prohibits federal courts from compelling journalists to testify unless certain conditions are met.

The Act applies to any "journalist," which is defined as an individual engaged in journalistic activity "for financial gain or livelihood" who is employed by or a contractor of a "professional medium or agency" that processes or researches "news or information intended for dissemination to the public." These limitations ensure that the privilege applies to reporters while avoiding the chance that it could be claimed by those who are not legitimate newsgatherers.

2. How would a reporter establish confidentiality so that the privilege applies? Would every communication, regardless of the source, be subject to the privilege?

The Free Flow of Information Act of 2006 protects journalists from being forced to disclose the identity of a source "who provided information under a promise or agreement of confidentiality made by the journalist while acting in a professional capacity." It also protects the substance of any communications—any "records, communication data, documents, or information the journalist obtained or created"—when that material was provided to the journalist "upon a promise or agreement that [it] would be confidential."

Under the text of the Act, establishing confidentiality requires a promise or agreement by the reporter to the source that the reporter will not reveal the source's identity. There are no specific requirements for the form of that promise or agreement. As the Act makes clear, it does not preclude compelling a journalist to produce "information identifying a source who provided information *without* a promise or agreement of confidentiality" (emphasis added), and it does not protect documents or information obtained by reporters without a promise that the material would be confidential.

Not every communication, regardless of the source, would be covered by the privilege. Instead, only those communications governed by a "promise or agreement" of confidentiality would fall within the scope of the privilege.

3. Does the legislation contain sufficient safeguards to avoid potential abuse of such a privilege?

The legislation contains multiple safeguards that guard against abuse of the privilege while still providing sufficient clarity and uniformity so that reporters, their sources, and the courts can benefit from a clearer picture of the governing law. Importantly, this bill provides an express exception for information that would assist in preventing an act of terrorism or that would prevent harm to national security interests. Reporters would not be protected against disclosure of such information or of information relating to the unauthorized disclosure of classified national security information. These national security provisions are a central part of this legislation, and I believe they will protect our security while ensuring reporters' ability to cover stories on these important topics. The bill also contains exceptions for reporters who are eyewitnesses to crimes or who themselves commit criminal or tortious conduct.

4. Please respond to th[e] testimony on the potential impact of the legislation on private litigation.

The Act treats subpoenas in civil litigation in largely the same manner as subpoenas of reporters for information in criminal cases. A civil litigant who seeks to compel disclosure from a reporter must establish by a preponderance of the evidence that, among other things, the information is "critical to the successful completion" of the case, that the party has "exhausted reasonable alternative sources of the information," and that nondisclosure would be "contrary to the public interest."

While some testimony before the Committee criticized the legislation as striking the balance too heavily in the reporter's favor, I believe it firmly establishes the privilege while still giving appropriate recognition to the interests of private litigants. It is important to understand that the Act does not create an absolute privilege for reporters in civil cases. Instead, it allows the court to consider the relative interests at stake in the particular dispute. This type of balancing test is similar to the tests already employed in many state and federal courts, and will not excessively burden private litigation.