

The Bush Administration Offers No Reason to Oppose The Free Flow of Information Act (S. 2035)

Recently, several Bush administration officials reiterated their opposition to S. 2035, the Free Flow of Information Act. *See* Letter from Secretary of Defense to Honorable Patrick J. Leahy (Mar. 31, 2008) (“DOD”); Letter from Michael B. Mukasey & J.M. McConnell to Honorable Harry Reid and Honorable Mitch McConnell (Apr. 2, 2008) (“DOJ”); Letter from Michael Chertoff to Honorable Patrick J. Leahy (Apr. 3, 2008) (“DHS”). These letters overlook both the pressing need to protect confidential sources and the Act’s robust protections for law enforcement and national security.

1. The Act’s protections are more necessary than ever.

- **Claim:** The Act is “unnecessary because all evidence indicates that the free flow of information has continued unabated in the absence of a Federal reporter’s privilege.” (DOJ at 1.)
- **In fact:** Reporters face increasing threats to their ability to keep sources confidential. Would-be sources are sure to notice:
 - In 2001, DOJ acknowledged that it had issued approximately 90 subpoenas to the media and that it had subpoenaed 19 journalists for information about confidential sources. *See* Letter from Daniel J. Bryant, Assistant Attorney General, Department of Justice, to the Hon. Charles E. Grassley, United States Senate, Nov. 28, 2001. Since then, federal and special prosecutors have subpoenaed at least 19 more journalists for information about confidential sources.
 - Since 2000, attorneys representing the federal government have secured the imprisonment of four journalists, who were jailed for an aggregate of more than 19 months.
 - Reporters have faced subpoenas from high-profile civil litigants such as Steven Hatfill and Wen Ho Lee and also in dozens of lower-profile cases nationwide. After five nonparty media organizations financed nearly half of Wen Ho Lee’s settlement with the government, litigants in future cases gained every incentive to subpoena reporters in the hopes of pressuring media organizations to finance a settlement and avoid yet another costly battle over subpoenas.
 - The increasing severity of the problem is highlighted by the preliminary report on the 2007 Media Subpoena Survey conducted by the Law College Foundation at the University of Arizona:
 - In 2006, the 761 responding news organizations received a total of 3,062 subpoenas seeking information or material relating to newsgathering;
 - Of these subpoenas, 335 arose out of proceedings that took place in a federal forum;

- Sixty-four percent of responding newsroom leaders believe that the number of subpoenas has increased in the last five years;
- Fifty percent of the surveyed media companies believe that they are more likely to be subpoenaed than they were five years ago; only 5 percent believe that subpoenas are less likely.
- Because many of the recent subpoenas and imprisonments have been high-profile, potential sources cannot help but take notice. Information cannot flow freely when sources believe that reporters cannot protect them.

2. The Act’s definition of “covered person” is narrow in scope and denies protections to foreign agents and terrorists.

- Claim: “There is no requirement that an individual be engaged in journalism as a livelihood in order to avail himself of the reporter’s privilege this bill would create.” (DOJ at 7.)
 - In fact: The definition of “covered person” requires that the journalistic activity be “regular” – and thus distinguishes between bona fide journalists and those who report the news infrequently. *See, e.g., Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 668 (1990) (“A valid distinction thus exists between [entities] that are part of the media industry and other corporations that are not involved in the *regular* business of imparting news to the public.”) (emphasis added).
- Claim: The Act “effectively provides a safe haven for foreign spies and terrorists who engage in some of the trappings of journalism but are not known to be part of designated terrorist organizations or known to be agents of a foreign power – no matter how closely linked they maybe to terrorist or other criminal activity.” (DOJ at 2.)
 - In fact: The definition of a covered person excludes terrorists and foreign agents.
 - The definition specifically excludes the following:
 - (1) “[A]ny person who is a foreign power or agent of a foreign power” as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978;
 - (2) “[A]ny organization designated by the Secretary of State as a foreign terrorist organization” as described in section 219 of the Immigration and Nationality Act;
 - (3) Terrorists and their financial supporters, as listed in “the Annex to Executive Order 13224”;
 - (4) “[A]ny person who is a specially designated terrorist” under 31 U.S.C. 595.31; or

- (5) “[A]ny terrorist organization, as that term is defined in section 212(a)(3)(B)(vi)(II) of the Immigration and Nationality Act.”
- The government does not explain why “foreign spies and terrorists” would not fall within those exceptions. In any event, it is unlikely that foreign spies and terrorists would provide truthful testimony about their sources, even if compelled to testify by a subpoena.
- The privilege is **unavailable** to any “covered persons” if they commit or witness a crime OR if the government satisfies the exceptions for terrorism, national security, or personal safety.

3. The Act provides ample protections for national security.

- Claim: The national security exception “does not apply to investigations of acts of terrorism and significant harm to national security that have already occurred.” (DOJ at 4.)
 - In fact: Section 2 of the Act allows for disclosure when necessary to investigate and prosecute past crimes, including acts of terrorism, and allows for disclosure when a leak of classified information will cause or has caused harm to national security.
- Claim: The Act “implicates critical national security authorities far beyond subpoenas—including authorities under the Foreign Intelligence Surveillance Act.” (DOJ at 2.)
 - In fact: Wiretaps, and other forms of compelled disclosure from communications service providers, are specifically governed by Section 6 of the Act. Without procedures to govern information gathered from service providers, the Executive could override the Act’s protections merely by tapping a journalist’s phone or reviewing her email without restriction.
 - In detailing procedures to govern information gathered from reporters’ service providers, the Act is modeled on the DOJ’s own guidelines. For instance, the DOJ guidelines apply not only to information sought from the reporter, but also to the reporter’s “telephone toll records.” 28 C.F.R. § 50.10.
- Claim: The public-interest balancing test, “to be applied by different Federal judges across the country, is a recipe for confusion and inconsistency.” (DOJ at 3.)
 - In fact: The Act finally creates a uniform, statutory standard for protection of confidential sources. Without the Act, it is the status quo – in which a variety of different tests and formulations are “applied by different Federal judges across the country” – that will continue to produce “confusion and inconsistency.”
- Claim: The public-interest balancing test “would still allow a given Federal district court judge, in his or her discretion, to shield disclosure based on the court’s own view of what constitutes harm to the national security, on the one hand, and the public’s interest in ‘newsgathering and maintaining a free flow of information’ on the other.” (DOJ at 4-5.)

- In fact: Even under a balancing test, courts will defer to the government when it invokes legitimate concern for national security. *See, e.g., N.Y. Times v. Gonzales*, 459 F.3d 160, 170 (2d Cir. 2006) (applying a balancing test and holding that the government could subpoena the phone records of a newspaper who was informed that the government planned to freeze the assets of and search the premises of two foundations suspected of financing terrorism); *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1178 (D.C. Cir. 2006) (Tatel, J., concurring in the judgment) (applying a balancing test and held “the public interest in punishing the wrongdoers—and deterring future leaks—outweighs any burden on newsgathering, and no privilege covers the communication.”).
- Claim: “[T]he national security exception only applies prospectively, not to cases involving terrorist acts and other harm to the national security that have already occurred.” (DOJ at 4.)
 - In fact: In many cases, information about those responsible for past acts of terrorism will assist in preventing future acts of terrorism – and thus will be covered by the national-security exception. In any event, Section 2 explicitly provides for disclosure when necessary for an investigation or prosecution of a crime – including a crime that is related to terrorism – if the government exhausts other sources of the information and satisfies the public-interest balancing test.
- Claim: The Act “transfers to the courts such core determinations as when investigative subpoenas are necessary and what constitutes harm to the national security.” (DOJ at 5.)
 - In fact: Judicial review ensures that the Executive does not improperly hide evidence of corruption and wrongdoing under the guise of “national security.”
 - Review by the courts ensures that the Executive is subject to proper checks and balances. As the Supreme Court has made clear, “a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004).
 - Judicial review is especially important because the very goal of the Act is to allow the press to serve as a check on the government. In the words of Republican Congressman Mike Pence: “As a conservative who believes in limited Government, I know that the only check on Government power in real-time is a free and independent press.” (House Judiciary Hearing, 6/14/07)
- Claim: The Act could “threaten the lives of military members and the success of current and future military operations.” (DOD at 1.)
 - In fact: Greater protections for anonymous sources could have saved troops’ lives and improved troops’ care.
 - In 1999, a then-classified military report concluded that if the U.S. toppled Saddam Hussein, there could be a “period of widespread bloodshed in which various

factions seek to eliminate their enemies” – even if the U.S. committed 400,000 troops to the task. *Desert Crossing Seminar* (July 22, 1999).

- Moreover, journalists embedded with our troops in Iraq and elsewhere have had a long history of withholding information that could cause harm to our military.
 - Anonymous sources provided information about the mistreatment of soldiers at the Walter Reed Hospital.
 - **Claim:** “The bill provides absolutely no mechanism by which a court could receive and consider classified and other sensitive national security information *ex parte* and under seal, so as to ensure that such information is not disclosed, resulting in additional harm to the national security.” (DOJ at 6 n.3.)
 - **In fact:** Such a mechanism already exists – courts always have the power to view evidence *in camera*. Indeed, *in camera* review is a staple of court cases that relate to national security, such as the Judith Miller case, litigation over the government’s surveillance program, and the government’s prosecution of terrorism suspects.
 - **Claim:** The Act will “delay the collection of critical information.” (DHS at 1.)
 - **In fact:** Any delays come from existing law, not from the Act.
 - The Act does not change the existing processes. Even without the Act, reporters routinely file motions to quash when served with subpoenas that require them to disclose confidential information.
 - By providing standards that are clear and uniform, the Act will make it easier – and faster – for judges to decide whether the reporter must disclose information.
 - **Claim:** The Act “contains no provision for expedited judicial review.” (DOJ at 6.)
 - **In fact:** Courts already have the power to expedite review, and regularly do so when time is of the essence. *See, e.g., Arthur v. King*, 500 F.3d 1335, 1137 (11th Cir. 2007) (granting expedited briefing because of impending execution); *Rochester-Genesee Reg’l Transp. Auth. v. Brigid Hynes-Cherin*, 506 F. Supp. 2d 207, 209 (W.D.N.Y. 2007) (“set[ting] a very expedited briefing and argument schedule” to ensure that a dispute about school buses would be resolved before the start of the school year).
- 4. The Act provides for source identification when classified leaks have harmed national security, but properly ensures protections for whistleblowers who provide information that should never have been classified in the first place.**
- **Claim:** The Act “sets forth a heightened evidentiary burden in leak cases.” (DOJ at 3.)

- In fact: In leak cases, as with all other showings, the Act requires that the government sustain its burden by a “preponderance of the evidence” – which requires only a showing that the harm is “more likely than not.” *See, e.g., Fadiga v. Att’y Gen.*, 488 F.3d 142 (3d Cir. 2007). At least a dozen states impose an even higher burden, such as “clear and convincing evidence.”
- Claim: “[B]y requiring some showing that the leaked information was ‘properly classified,’ the bill raises the troubling prospect of every leak investigation becoming a mini-trial over the propriety of the Government’s classification decision.” (DOJ at 3.)
 - In fact: Courts already review the propriety of classification decisions and defer to the government so long as the decision is reasonable.
 - Under the Freedom of Information Act, courts already examine whether the Executive’s classification decisions were proper under the governing executive order.
 - The purported “mini-trials” have not materialized; the government typically sustains its burden by submitting an affidavit in camera.
 - Courts give “deference to reasoned and detailed [government] explanations of that classification decision,” and seek merely to ensure that “the reasons for classification are rational and plausible ones.” *McGehee v. Casey*, 718 F.2d 1137, 1148-49 (D.C. Cir. 1983).
- Claim: “[T]he bill’s supporters believe that harming national security is somehow more acceptable or tolerable when done via a leak than when it is done in some other way” and “the bill essentially serves as a road map to leaking classified information.” (DOJ at 3.)
 - In fact: The Act expressly provides for disclosure from the journalist when a leak of classified information has harmed or will harm national security. Because most information is classified improperly, and thus does not implicate national security, independent judicial review is essential:
 - Most classified information has been classified improperly.
 - Rodney P. McDaniel, Executive Secretary of the National Security Council under President Reagan: Only 10 percent of classification was for “legitimate protection of secrets.” 1997 Moynihan Commission Report, at 36.
 - Governor Kean, who was Chair of the 9/11 Commission: “Three-quarters of what I read that was classified shouldn’t have been.” Cox News Service, July 21, 2004.
 - Anonymous sources can supply information that Congress needs to oversee the protection of national security.

- Corruption and violence in Iraq: The State Department retroactively classified internal memos that describe how the Iraqi government has blocked investigations into corruption and how corruption investigators and their families are being tortured and killed. Wash. Post., Oct. 5, 2007.
 - Torture: In 2005, the Department of Justice drafted a new, secret memo authorizing torture. Sen. Rockefeller stated: “I find it unfathomable that the [Intelligence Committee] would be provided more information by *The New York Times* than by the Department of Justice.” N.Y. Times, Oct. 5, 2007.
 - Other issues: Disclosure of classified information to journalists exposed the events at Abu Ghraib, fraud in the defense industry, and the endangerment of American uranium workers.
- Claim: The national security exception “could be read to exclude leaks of classified information.” (DOJ at 4.)
 - In fact: The text of the national security exception does not distinguish between different sources of national-security threats. Read naturally, the exception covers all threats to national security, whether or not they are caused by a classified leak.

5. The Act provides ample protection for law enforcement.

- Claim: The Act will “hamper the ability of Federal law enforcement to investigate and prosecute serious crimes like gang violence and child exploitation.” (DOJ at 2.)
- In fact: Although 49 states recognize a reporters privilege by statute or common law, DOJ still cannot identify a single actual example where a reporters’ privilege has hampered the investigation of a crime at the state level.
 - The Act provides for disclosure when necessary to the investigation or prosecution of a crime, and requires disclosure when necessary to prevent death, kidnapping, or bodily harm.
 - Attorneys General from 34 states recently urged the Supreme Court to recognize a federal reporters’ privilege.

6. The Act affords modest protections to confidential sources and reflects numerous concessions and amendments designed to protect national security and law enforcement.

- Claim: “The bill provides a broadly defined class of ‘covered persons’ with extraordinary legal protections against having to reveal any confidential sources.” (DOD at 1.)
- In fact: The protections are far from “extraordinary,” and in fact are quite modest.
 - The Act provides for reporters to identify their sources when (1) necessary to conduct a criminal investigation or prosecution, (2) necessary to litigate a civil case, (3) nec-

essary to prevent death, kidnapping, or bodily harm, (4) the information would assist in preventing an act of terrorism or other harm to national security, and (5) when the reporter witnessed or committed a crime.

- In the words of President Bush's former Solicitor General, Ted Olson, "This legislation is well balanced and long overdue, and should be enacted."