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FREE FLOW OF INFORMATION ACT OF 2009

MARCH 30, 2009.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CONYERS, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 985]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 985) to maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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PURPOSE AND SUMMARY

H.R. 985, the "Free Flow of Information Act of 2009," ensures that members of the press may engage in effective journalism and utilize confidential sources without harming themselves or their sources, by providing a qualified privilege that prevents a reporter's source material from being revealed except under certain circumstances, such as where it is necessary to prevent an act of terrorism or other significant and specified harm to national security, or imminent death or significant bodily harm. The bill thus strikes a careful balance with respect to promoting the free dissemination of information and ensuring effective law enforcement and the fair administration of justice, while containing substantial protections for law enforcement and ensuring that information needed to protect the national security or other critical interests will be accessible when needed.

H.R. 985 is identical to H.R. 2102 from the 110th Congress, in the amended form in which it passed the House of Representatives on October 16, 2007, by a recorded vote of 398–21.

BACKGROUND AND NEED FOR THE LEGISLATION

BACKGROUND

The First Amendment and Freedom of the Press

The First Amendment of the Constitution states that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[1] Historically, the press has played an essential role in disseminating information to the public.[2] In addition to providing general news about crimes against the state, the press has been thought to further the values of the First Amendment by providing information on issues of public concern, including the conduct and actions of public officials and instances of government corruption.[3] Thus, it has been recognized that the press should be protected from undue government interference when gathering and disseminating information if it is to provide newsworthy information to the general public.[4] The Supreme Court has recognized this and has struck down laws that have restricted the press's ability to broadcast information of public concern.[5] Since confidential sources are

[1] U.S. Const. amend. I.

[2] See Bradley S. Miller, The Big Chill: Third-Party Documents and the Reporter's Privilege, 29 U. Mich. J.L. Ref. 613, 623 (1995–96) (discussing the importance of the press in getting useful information about government to the people); see also Citizen Pub. Co. v. United States, 394 U.S. 131, 139–40 (1969) (explaining that a free press is key to a free society as it ensures widespread and diverse dispersal of information).

[3] See New York Times v. Sullivan, 376 U.S. 254, 270 (1964) (stating that "debate on public issues should be uninhibited, robust, and wide-open"); see also Mills v. Alabama, 384 U.S. 214, 218 (1966) (asserting that "a major purpose of that Amendment was to protect the free discussion of government affairs"); Garrison v. Louisiana, 379 U.S. 64, 77 (1964) (suggesting that there is "paramount public interest in a free flow of information to the people concerning public officials"). See generally David A. Anderson, The Origins of the Press Clause, 30 UCLA L. Rev. 455 (1983) (detailing history of Press Clause).

[4] See Bradley S. Miller, The Big Chill: Third-Party Documents and the Reporter's Privilege, 29 U. Mich. J.L. Ref. 613, 623 (1995–96) (arguing that the press must be free of governmental restrictions so it can remain the "investigative arm of the people," uncovering government corruption and other crimes detrimental to American people); see also New York Times v. United States, 403 U.S. 713, 728 (1971) (Stewart, J., concurring) (arguing that in certain areas of government, the only checks and balances against government power may be "enlightened citizenry," and an alert and free press is essential to bestow knowledge on the public).

[5] See, e.g., Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (overruling limitations on press access to judicial proceedings); Sullivan, 376 U.S. at 281 (establishing "actual malice" standard for defamation claims by public officials).

thought to be particularly important to bringing unrestricted information of public interest to light, it has been argued that the First Amendment offers protection against the compulsory disclosure of these confidential sources by the Federal Government.[6]

There are typically two bases in the First Amendment supporting the privilege: (1) the need to protect the free flow of information and ideas, and (2) the need to keep the government from interfering with the press or commandeering it as an investigative arm.[7] With respect to the first point, the right to publish is worthless without the right to gather information; shield law protection is necessary because some reporting is dependent on informants, and some informants are unwilling to be named because of fear of retribution, embarrassment, or harm. Those informants could be deterred by the risk of being compulsorily named; as a result, reporters would neither have access to nor be able to publish important information.

With respect to the second point, it is often argued by the press that the extent of interference with the journalistic process is significant, as "subpoenas are inherently, invariably, inescapably burdensome."[8] Responding to subpoenas requires much time and expense, and the subpoenas often seek information that is only marginally relevant.[9] The press further asserts that complying with a subpoena may also have an adverse impact on a journalist's credibility, as testifying for one side may make the journalist appear biased.[10]

The Issue of Journalistic Privilege

In *Branzburg v. Hayes,*[11] the Supreme Court ruled on a claim of journalists' privilege for the first time.[12] In an opinion by Justice White, the Court held that a journalist could not rely on an absolute First Amendment-based privilege to refuse to testify when questioned by a grand jury, unless the grand jury investigation was "instituted or conducted other than in good faith."[13] The Court reasoned that the public's interest in prosecuting crime outweighed its interest in journalists' being permitted to preserve their confidential relationships. The Court, however, noted that there was "merit

[6] Mark Gomsak, Note, The Free Flow of Information Act of 2006: Settling the Journalist's Privilege Debate, 45 Brandeis L.J. 597, 601 (2007).

[7] Id. at 601.

[8] Id. at 608 (arguing that subpoenas devour time and resources better used for other purposes and entangle people in the criminal process).

[9] See id. at 609 (citing Judge Richard Posner's statement that subpoenas can lawfully require testimony about activities both "intensely private and entirely marginal to the purpose of the inquiry").

[10] Bradley S. Miller, The Big Chill: Third-Party Documents and the Reporter's Privilege, 29 U. Mich. J.L. Ref. 613, 623 (1995–96) (suggesting that the subpoena threat may puncture the cooperative atmosphere between reporter and source by redirecting attention to the question of the reporter's loyalties); see, e.g., Cohen v. Cowles Media Co., 501 U.S. 663, 665 (1991) (concluding that the First Amendment does not prohibit a plaintiff from recovering damages for a reporter's breach of a promise of confidentiality).

[11] 408 U.S. 665 (1972).

[12] The first claim by a reporter that the First Amendment justified a refusal to provide information came in a case in which a columnist reported several allegedly defamatory statements from an anonymous CBS source about actress Judy Garland. Garland v. Torre, 259 F.2d 545, 547 (2d Cir. 1958). Garland sued CBS; in her deposition, the reporter refused to answer questions about the source of the statements. Id. The Second Circuit held that the First Amendment did not confer a right to refuse to answer questions, at least when the questions "went to the heart of the . . . claim." Id. at 548–50.

[13] 408 U.S. 665, at 707.

in leaving state legislatures free, within First Amendment limits, to fashion their own standards" regarding journalists' privilege.[14]

Justice Powell's concurrence in *Branzburg* stressed the need for a test to strike the "proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct."[15] He explained that a court could quash a subpoena where "legitimate First Amendment interests require protection."[16] In his dissent, Justice Stewart went a step further and proposed a specific balancing test.[17] Under his test, in order to make a journalist comply with a subpoena to appear before a grand jury and reveal confidential sources and information, the government must: (1) show that there is probable cause to believe that the reporter has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) establish a compelling and overwhelming interest in the information.[18]

In the aftermath of *Branzburg,* there have been recurring calls for a Federal shield law or for a reconsideration of that decision.[19] Although nearly one hundred bills was introduced in the 6 years after the *Branzburg* decision,[20] none of these measures was passed, a failure that is partially attributed to an inability to reach consensus on the definition of "journalist," and to the insistence of the press on an absolute privilege, not a qualified one.[21] In 1970 the Attorney General promulgated guidelines to govern the issue for the Department of Justice.[22] These guidelines require the Department to: balance First Amendment values with the need for the information sought by the subpoena; make a reasonable attempt to get the information from alternative sources; negotiate with the news media before issuing a subpoena; obtain Attorney General approval before issuing a subpoena; and specify reasonable grounds for the Department's belief that the information sought by the subpoena is essential.[23]

Also since the *Branzburg* decision, Federal courts have continued to develop a common law privilege on a case-by-case basis.[24] Some Federal courts have recognized a qualified journalist's privilege in non-grand jury settings, some have extended it to both civil and criminal proceedings, and some have even extended the privilege to non-confidential sources.[25] This lack of uniformity among the Fed-

[14] Id. at 706

[15] Id. at 726 (Powell, J., concurring).

[16] Id.

[17] Id. at 743 (Stewart, J., dissenting).

[18] Id.

[19] Paul Marcus, The Reporter's Privilege: An Analysis of the Common Law, Branzburg v. Hayes, and Recent Statutory Developments, 25 Ariz. L. Rev. 815, 866–67 (1984) (calling for a uniform national standard for the national news-gathering media).

[20] Id. at 867.

[21] 23 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure 5426, at 738–39 (1980) (concluding that the press eventually lost interest in seeking a Federal legislative solution to the subpoena problem).

[22] See 28 C.F.R. 50.10 (1970).

[23] Id.

[24] See Riley v. City of Chester, 612 F.2d 708, 714 n.6 (3d Cir. 1979) (quoting a comment by the principal drafter of the Federal Rules of Evidence that "the language of Rule 501 permits the courts to develop a privilege for newspaperpeople on a case-by-case basis").

[25] Paul Marcus, The Reporter's Privilege: An Analysis of the Common Law, Branzburg v. Hayes, and Recent Statutory Developments, 25 Ariz. L. Rev. 815, 864 (1984).

eral courts has prompted calls from journalists and scholars for Federal legislation.

The Federal Rules of Evidence

Federal Rule of Evidence 501 states that except as provided by an Act of Congress or in rules prescribed by the Supreme Court, Federal privileges should be governed by the principles of common law. When courts recognize a privilege, it has been for the purpose of protecting information shared in the context of a special relationship, such as that between attorney and client, or between husband and wife. Privileges are created to promote sharing information without the fear that either party will be forced to disclose to a third party.

In 1996, the Supreme Court issued a three-part test for when a new privilege may be created: 1) whether the proposed privilege serves significant public and private interests; 2) whether the recognition of those interests outweighs any burden on truth-seeking that might be imposed by the States; and 3) whether such a privilege is widely recognized by the States.

State Shield Laws

Since Branzburg, 49 States and the District of Columbia now recognize some version of a shield law protecting the press, to varying degrees, from unfettered disclosure of sources, work product, and information generally. While 16 of these States recognize a reporter's privilege as a result of judicial decisions, only 13 States and the District of Columbia accord an absolute privilege for a journalist to withhold information, regardless of the State's demonstration of need for the information.

The various State statutes range in scope, from broad protections that provide an absolute journalistic privilege, to shield laws that offer a qualified privilege.[26] The majority of State shield laws currently in place offer some form of a qualified privilege to reporters that protects source information in judicial settings, unless the compelling party can establish (1) that the information is relevant or material; (2) that it is unavailable by other means, or through other sources; and (3) that a compelling need exists for the information.[27] The States tend to vary on the last element, with some requiring the compelling party to establish whether the need exists as to the party's case, and others whether the need serves a broader public policy.[28] In Federal courts, however, there is no uniform set of standards governing when testimony can be sought from reporters.

NEED FOR THE LEGISLATION

This legislation is essential for journalists to be able to protect confidential sources. Without this protection, many sources of information may be unwilling to come forward with critical information. The privilege is necessary to preserve the free flow of information.

[26] Carey Lening & Henry Cohen, Journalists' Privilege to Withhold Information in Judicial and Other Proceedings: State Shield Statutes, Congressional Research Service Report for Congress, Mar. 8, 2005.
[27] Id.
[28] Id.

Many people view the press as the fourth branch of government, serving in the checks and balances system that underlies our democracy. Over the years, the press has uncovered scandals and corruption in the government, and criminal behavior, often attributable to an undisclosed source. In fact, many stories would not have been published without a promise of confidentiality of sources—Watergate and Iran-Contra come to mind, among many others. More recent news stories brought to light based on confidential sources include the conditions at the Walter Reed Army Medical Center, the Abu Ghraib prison scandal, and the abuse of steroids by baseball players.

A Federal shield law is also needed because of the lack of uniform standards—at both the Federal level and State level—to govern when testimony can be sought from reporters. This argument was made by 34 State attorneys general, including the District of Columbia, in an amicus brief filed May 27, 2005.[29] In the brief, the attorneys general recognized that 49 States and the District of Columbia had some form of a shield law, and state that "[l]ack of a corresponding Federal reporter's privilege undercuts the States' privileges recognized in forty-nine States and causes needless confusion." The attorneys general also suggested that three decades after *Branzburg,* the change in the State law landscape and the confusion in the Federal circuits made the consideration of a Federal reporter's privilege ripe for review.[30]

Because the privilege is not absolute, this law will prevent law enforcement officials from using journalists and the results of their fact-gathering as a shortcut to a proper investigation, but will not prevent law enforcement or civil litigants from obtaining information that is truly needed to protect the national security or other significant interests and that is not reasonably available from any other source. H.R. 985 contains significant provisions carefully crafted during the last Congress to ensure a fair and practical balance between the public's right to know and the need to protect national security and other critical interests—provisions that resulted in a consensus measure that passed the House by an overwhelming margin of 398–21.

HEARINGS

The full Committee on the Judiciary held 1 day of hearings on a predecessor bill, H.R. 2102, during the 110th Congress, on June 14, 2007. Testimony was received from Rachel Brand, Assistant Attorney General for Legal Policy, U.S. Department of Justice; William Safire, columnist, N.Y. Times; Lee Levine, partner, Levine, Sullivan Koch and Schultz, LLP; Randall Eliason, Professional Lecturer in Law, George Washington University Law School and Washington College of Law, American University; and Jim Taricani, reporter, WJAR TV, Providence, Rhode Island.

[29] Brief for the State of Oklahoma, et al. as Amici Curiae Supporting Petitioners, Miller v. United States, No. 04–1507 (May 27, 2005).

[30] Id.

COMMITTEE CONSIDERATION

On March 25, 2009, the Committee met in open session and ordered the bill, H.R. 985, favorably reported without amendment by voice vote, a quorum being present.

COMMITTEE VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that there were no recorded votes during the Committee's consideration of H.R. 985.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 985, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 27, 2009.

Hon. JOHN CONYERS, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 985, the "Free Flow of Information Act of 2009."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Leigh Angres, who can be reached at 226–2860.

Sincerely,

DOUGLAS W. ELMENDORF,
DIRECTOR.

Enclosure

cc: Honorable Lamar S. Smith.
Ranking Member

H.R. 985—Free Flow of Information Act of 2009.

CBO estimates that implementing H.R. 985 would have no significant effect on the federal budget. H.R. 985 would exempt journalists from being compelled to produce documents or provide testimony unless a court finds that one of the following exceptions apply:

- The party seeking information has exhausted all reasonable alternative sources;
- In criminal investigations or prosecutions, there are reasonable grounds to believe a crime has occurred, and the testimony or document sought is critical to the investigation, prosecution, or defense;
- In all other matters, the information sought is critical to the completion of the matter;
- In cases where a source's identity could be revealed, the document or testimony sought is necessary to prevent certain actions, including an act of terrorism, among others; and
- The public interest in compelling disclosure of the document or information involved outweighs the public interest in gathering or disseminating news information.

The bill also would limit the content of subpoenaed testimony or documents. Finally, under the bill, communication service providers (i.e., telecommunications carriers and Internet service providers) could not be compelled to provide testimony or documents relating to a reporter's phone, email, and computer use, unless one of the above exceptions applies.

Under current law, requests to subpoena journalists on matters related to federal cases typically originate within the Department of Justice (DOJ). Federal prosecutors can request a subpoena of a journalist from a court after an internal review by DOJ. Information from DOJ indicates that very few subpoena requests seeking confidential source information are approved each year (there were a total of 19 over the 1991–2007 period) and that it is unlikely that the bill would substantially increase such requests. Thus, CBO assumes that there would be very few instances each year when such a subpoena could be challenged in court.

Journalists already challenge some subpoenas under current law, and H.R. 985 would clarify the instances when a journalist would be compelled to produce information or testify. The bill might increase federal attorneys' litigation duties if more subpoenas would be challenged than under current law, but given the small number of potential cases, CBO estimates that any increase in federal spending would be insignificant. In addition, based on information from the Administrative Office of the United States Courts, CBO expects that the bill would not appreciably increase the courts' workloads. Therefore, CBO estimates that implementing H.R. 985 would have no significant budgetary impact.

H.R. 985 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Leigh Angres. This estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 985 is intended to ensure the free flow of information to the public by setting conditions on federally compelled disclosure of information from certain persons connected with the news media.

Constitutional Authority Statement

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, section 8, clause 18 of the Constitution and the First Amendment.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 2102 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of Rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee:

Section 1. Short Title—Section 1 sets forth the bill's short title as the "Free Flow of Information Act of 2009."

Section 2. Compelled Disclosure from Covered Persons—Section 2 establishes a procedure by which disclosure of confidential information from a journalist may be compelled. Subsection (a) states that a Federal entity may not compel a journalist to testify or provide documents related to information obtained or created by the journalist, unless the following conditions are met by a preponderance of the evidence and after notice and an opportunity to be heard:

1) The party seeking production must have exhausted all reasonable alternative sources of the information.
2) If it is a criminal investigation, the party seeking production must have reasonable grounds to believe a crime has occurred and the information sought is critical to the case. If it is a civil investigation, the information must be critical to the successful completion of the case.
3) If the information could reveal the identity of a confidential source, disclosure is only allowed when necessary to:
    (A) prevent an act of terrorism against the United States or its allies, other significant harm to national security, or to identify the perpetrator of such an act;
    (B) prevent imminent death or significant bodily harm;
    (C) identify a person who has disclosed a trade secret actionable under 18 U.S.C. §1831 or §1832; individually identifiable health information as defined in section 1171(6) of the Social Security Act; or nonpublic personal information as defined in section 509(4) of the Gramm-Leach-Bliley Act; or
    (D) identify for purposes of criminal prosecution a person who made unauthorized disclosure of properly classified

information, where the disclosure caused or will cause significant harm to national security.

4) If the three requirements above are met, the party seeking production must also establish by a preponderance of the evidence that the public interest in compelling disclosure outweighs the public interest in gathering or disseminating news or information. Subsection (b) of this section expressly permits the court to consider the extent of any harm to national security in conducting this balancing.

Subsection (c) states that, where disclosure is ordered, the content of any information ordered to be produced should not be overbroad, unreasonable, or oppressive, and should, where appropriate, be limited to the purpose of verifying published information or describing surrounding circumstances relevant to the accuracy of the published information. Subsection (c) also states that the content should be narrowly tailored in subject matter and period of time so as to avoid the production of peripheral, nonessential, or speculative information.

Subsection (d) states that nothing in the bill should be construed to apply to state-law defamation, slander, or libel claims or defenses.

Section 3. Compelled Disclosure From Communications Service Providers—Section 3(a) provides that the protections of section 2 apply equally to an attempt by a Federal entity to get information from a communication service provider ("CSP") that relates to a business transaction between the CSP and a covered person as to an attempt to get the information directly from the covered person—for example, if the government attempts to obtain a reporter's e-mails from the reporter's Internet service provider instead of directly from the reporter.

Subsection (b) requires that a court give the covered person notice and opportunity for hearing before ordering a CSP to disclose information described in subsection (a). Notice must be given no later than the time the subpoena or request is issued. Subsection (c) provides that notice may be delayed only if the court determines by clear and convincing evidence that not delaying it would pose a substantial threat to the integrity of a criminal investigation.

Section 4. Definitions—Section 4 defines the following terms:

1) "Communications service provider" is a person that transmits information of a customer's choosing by electronic means and includes a telecommunications carrier, an information service provider, and an information content provider (as those terms are defined in the Communications Act).

2) "Covered person" is a person who, for a substantial portion of the person's livelihood, or for substantial financial gain, is regularly engaged in journalism (including supervisors, employers, parents, subsidiaries, or affiliates of a covered person). A covered person does not include any person who is a foreign power or agent of a foreign power under Section 101 of the Foreign Intelligence Surveillance Act; any foreign terrorist organization as designated by the Secretary of State in accordance with section 219 of the Immigration and Nationality Act; any person identified as a financial

supporter of a terrorist organization in the Annex to Executive Order 13224, or whose assets are blocked under that order; any person designated as a terrorist under 31 C.F.R. 595.311; or any terrorist organization as defined in Section 212(a)(3)(B)(vi)(II) of the Immigration and Nationality Act.

3) "Document" means writings, recordings, and photographs (as defined in the Federal Rules of Evidence).
4) "Federal entity" is an entity or employee of the judicial or executive branch or an administrative agency with subpoena power.
5) "Journalism" is gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news of information that concerns local, national, or international events or other matters of public interest for dissemination to the public.

Dissenting Views

The United States has enjoyed a free press for over 200 years because it is guaranteed by the First Amendment in the Constitution. Our Founders understood that a free press protects and perpetuates our democracy.

There has been no federal media shield law to protect journalists' sources because there has been no evidence of a need. No more than 17 journalists during the past 25 years have been jailed for refusing to testify before a grand jury. They were not singled out for punishment. Every American called to testify before a grand jury must cooperate or face this consequence.

Nor is there any evidence that potential sources have withheld critical information from reporters because of a fear of being revealed. Just look at the examples that are regularly revealed—from Watergate to the mistreatment of soldiers at Walter Reed Medical Center.

H.R. 985 creates a press "privilege" under which courts cannot compel reporters, tabloids, or even some professional bloggers to provide information needed to fight crime.

In the 37 years since the Supreme Court ruled that the First Amendment does not shield a reporter from testifying in a grand jury proceeding, the media have had no problem exposing corruption and injustice.

While confidentiality is vital to the work of a reporter, national security is essential to the preservation of a free nation.

Protecting anonymous sources should never be more important than protecting the American people or solving crimes that can help save lives.

Unfortunately, this bill raises serious law enforcement and national security concerns.

However well-intentioned, H.R. 985 will compromise the work of the Justice Department and other federal agencies charged with crime-fighting, intelligence-gathering, and national security matters.

For example, the prospective nature of some of the most important exceptions in this bill—to prevent a terrorist attack or imminent bodily harm—will not help in investigations after the attack has occurred.

Under the bill, law enforcement officials could have acquired relevant information identifying a reporter's source on September 10, 2001—to prevent the terrorist attacks—but could not have acquired that same information on September 12 to track down terrorists.

Similarly, officials could acquire information regarding a reporter's source to prevent the molestation of a child, but they could not get that same information to bring a sexual predator to justice after the assault.

And in cases involving the identity of a reporter's source, look at the range of misconduct that falls outside the "death or imminent bodily harm" exception: corporate and financial crimes, human trafficking, gun and drug trafficking, gang activity, and other criminal activity that might not result in a direct risk of "imminent death or significant bodily harm," even when such harm is a predictable result of the crime.

This new privilege has no precedent in American legal history.

All H.R. 985 does is create a privilege that allows reporters to avoid a civic duty. The bill goes beyond promoting a free press; it confers on the press a privileged position. It exempts journalists from the same responsibilities that we are all held to in the context of an investigation.

And the media should be more forthcoming about their methods in promoting H.R. 985. We hear a lot from the media about the evils of lobbying and how Congress is captive to special interests.

But media outlets, in a very self-serving way, are lobbying House Members to support H.R. 985 or face the consequences—irate hometown newspaper editors and local TV and radio reporters.

These media proponents are a lot like the lobbyists the media regularly criticize—those who advocate for their special interests without disclosing campaign contributions. But there is no way to quantify or report the value of a journalist's "in-kind" contribution—a positive editorial if the Member supports the bill—or a negative editorial if the Member opposes the bill.

There is an absence of transparency and accountability here. It is unseemly, and possibly unethical, to make phone calls and write editorials in support of this bill when the motive is so clearly one of self-interest.

This bill is not about protecting the public's right to know about corruption or malfeasance. It is about giving a reporter a special privilege at the expense of our national crime-fighting efforts.

Also, we have a new President who has said he generally supports the legislation. But conceptual support is not an unqualified endorsement of the bill's language. We may very well benefit from listening to the President and his Attorney General about the specific text of H.R. 985.

As we have seen in recent days, the President sometimes modifies his support of legislation he has previously encouraged.

To illustrate, it is very possible that the Justice Department may advocate that we change a number of provisions. This may include minimizing the restrictions on disclosure of source identification, eliminating the public interest "balancing test" when national security is involved, and deleting the "necessity" standard when the government is trying to acquire information to prevent a terrorist attack.

These and other changes would improve the bill. We hope the Administration and the bill supporters are open to working with us on further refinements to H.R. 985.

We sympathize with journalists not wanting to reveal their sources. But as Members of Congress, we have a responsibility to see that the law enforcement and intelligence officials who keep us safe can do their jobs. H.R. 985 creates serious law enforcement and national security problems without sufficient justification.

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F. JAMES SENSENBRENNER, JR.
DARRELL E. ISSA.
STEVE KING.
GREGG HARPER.