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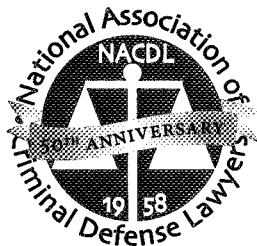
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March 2, 2009

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Arlen Specter
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Potential Criminal Justice Implications of Federal Reporters' Shield Legislation

Dear Senators,

The "Free Flow of Information Act" (S. 448; H.R. 985), often referred to as the Federal Reporters' Shield Legislation, was reintroduced in the 111th Congress. Soon after this legislation was introduced in the 110th Congress, as S. 2035 and H.R. 2102, the National Association of Criminal Defense Lawyers (NACDL) formed its Reporters' Shield Legislation Task Force to study the proposed law and ascertain the potential implications for the integrity and fairness of our criminal justice system. I write to you on behalf of NACDL to explain our specific concerns with the language of the most recent versions and to articulate our view that any legislation of this nature not be used to undermine the criminal justice process.

NACDL believes that any reporters' shield law must balance the protection of journalists and their sources and the common societal good that flows from that protection, with the need to ensure the integrity of America's criminal justice system and the individual's constitutional rights and liberties that are at stake. A shield law cannot be used, for example, to deprive the accused of procedural rights necessary to ensure due process of law, the effective assistance of counsel, and the right to confront a witness in a public, open trial.

"LIBERTY'S LAST CHAMPION"

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As a defender of the U.S. Constitution, NACDL is committed to a free and vibrant press as a critically important element of a democratic government. A free press is a critical check on government power when it exposes abuses of that power to the electorate. Accordingly, NACDL understands the importance of protecting journalists and their sources and appreciates the mission of our many allies in supporting this legislation.

NACDL has four major concerns with the legislation as it currently stands with regard to the need for shielded information in criminal cases. It provides no guaranteed disclosure of exculpatory evidence. It provides no guaranteed disclosure of evidence which impeaches witnesses. It may operate to shield the improper leaking of criminal investigation information by state actors. And it does not clearly define who is a journalist to prevent overbroad application of the law. The first three concerns are of a Constitutional dimension and are more fully explained below.

The version of the reporters' shield legislation passed by the House of Representatives in October 2007, and that was reintroduced on February 11, 2009, provides as one of the "Conditions for Compelled Disclosure":

In any matter arising under Federal law, a Federal entity may not compel a covered person to provide testimony or produce any document related to information obtained or created by such covered person as part of engaging in journalism, unless a court determines by a preponderance of the evidence, after providing notice and an opportunity to be heard to such covered person --

* * *

(2) that --

- (A) in a criminal investigation or prosecution, based on information obtained from a person other than the covered person --
 - (i) there are reasonable grounds to believe that a crime has occurred; and
 - (ii) the testimony or document sought is critical to the investigation or prosecution or to the defense against the prosecution; or
- (B) in a matter other than a criminal investigation or prosecution, based on information obtained from a person other than the covered person, the testimony or document sought is critical to the successful completion of the matter;¹

Following the passage of H.R. 2102 in the House of Representatives on October 16, 2007, a version of the legislation, S. 2035, was reported to the Senate by the Senate Judiciary Committee. That

¹ H.R. 985, 111th Cong. § 2(a)(2) (2009).

Senate version changed the word “person” to “source” in § 2 (a)(2)(A) & (B)² and changed the phrase “critical to the successful completion” to “essential to the resolution” in § 2 (a)(2)(B). The Senate version also added a third condition *permitting* compelled disclosure by a federal entity

- (iii) in a criminal investigation or prosecution of an unauthorized disclosure of properly classified information by a person with authorized access to such information, such unauthorized disclosure has caused or will cause significant, clear, and articulable harm to the national security.³

These changes, except for the use of “clear” in (iii) above, remain in the version introduced on February 13, 2009, S. 448. Both the House and Senate conditions would not be satisfied, though, unless “the party seeking to compel production of such testimony or document has exhausted all reasonable alternative sources (other than [a] covered person) of the testimony or document[.]”⁴ In addition, the House version would only permit compelled disclosure if the Federal Court also found “that the public interest in compelling disclosure of the information or document involved outweighs the public interest in gathering or disseminating news or information.”⁵

NACDL opposes this legislation without changes to address our concerns because the measure fails to strike the proper balance between the reporters’ privilege and the rights of the criminally accused. First, as mentioned above, there are constitutional interests at stake where there exists exculpatory information that is not available to the defendant, because the accused has a sixth amendment constitutional right “to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor...”⁶ Neither version of the legislation appears to provide a guaranteed exception for exculpatory information. Instead, the Senate version requires a finding that the information is “essential,” and the House version requires a finding that the information is “critical.”⁷ NACDL believes that the test for compelled disclosure of such information should be relevance, specifically *any* information that may be favorable to the accused or is reasonably likely to lead to the discovery of such information. *United States v. Safavian*, 233 F.R.D. 205 (D.D.C. 2006).

² “Source” is not defined in either the House or the Senate version.

³ S. 2035, 110th Cong. § 2(a)(2)(A)(iii) (2007).

⁴ H.R. 985, 111th Cong. §2(a)(1); S.448 § 2(a)(1) (2009).

⁵ H.R. 985, § 2(a)(4) (2009). The Senate version’s variant of the public interest prong requires that a Federal Court find “that nondisclosure of the information would be contrary to the public interest, taking into account both the public interest in compelling disclosure and the public interest in gathering news and maintaining the free flow of information.” S. 448, § 2(a)(3) (2009).

⁶ U.S. CONST. amend. VI.

⁷ S. 448 § 2(a)(2)(A)(ii) (2009); H.R. 985 § 2(a)(2)(A)(ii) (2009).

Second, to the extent that there is other exculpatory information relevant to a criminal prosecution, for example, information pertaining to the credibility of a witness in the matter, a defendant may be deprived of a fair trial if a journalist is not required to disclose such information in her possession. NACDL believes that there must be a mechanism in any shield legislation that enshrines the primacy of a fair trial for those accused of a crime over the protection afforded a covered journalist. NACDL is concerned that this legislation's balancing test will prioritize the sanctity of the reporter-source relationship above the liberty interests of the accused. This would render the measure constitutionally infirm because the law would place a congressionally imposed impediment to the discovery of information to which an accused citizen is constitutionally entitled. Thus, this will bring about federal writs of habeas corpus and other attacks on convictions rendered defective because of the non-production of this material.

Third, any federal law that assures the confidentiality of journalists' sources must not operate to protect unethical law enforcement officials who anonymously leak investigatory information, grand jury or otherwise, concerning potential and the actually criminally accused in violation of federal law. Using a public interest balancing test to compel disclosure could have the effect of protecting sources of illegally and/or unethically leaked information. And this could encourage law enforcement to improperly color the progress of an investigation or trial.

The cases of Richard Jewell, Wen Ho Lee, and Steven Hatfill highlight how law enforcement could use such a shield as a sword during the pendency of a criminal investigation. In the modern world of the 24/7 news cycle and the ubiquity of information, criminal defendants, and even "persons of interest," can suffer destruction of their reputations and livelihoods without ever being put on trial. In the absence of a mechanism for the discovery of sources of improperly leaked "information," a federal reporters' shield law can enable a trial by public opinion without any meaningful recourse.

Fourth, NACDL is concerned that the legislation, in its current form, leaves some ambiguity as to who is a "journalist" for the purposes of the shield. The Senate version defines a "covered person" as "a person who is engaged in journalism," which is defined as

the regular gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public.⁸

The House version defines "journalism" in nearly the same way,⁹ but qualifies who is a "covered person" under the proposed law by requiring regular engagement in journalism "for a substantial portion of the person's livelihood or for substantial financial gain...."¹⁰ A more careful delineation of who is a journalist, or what is journalism, for the purposes of this law would benefit all interested parties in this legislation. The absence of a clear definition of a "covered person" runs the risk of inviting a claim of privilege where there was no intention to create one. Of course, a lack of clarity in this regard only invites additional litigation.

⁸ S. 448, § 8(2)(A) & (5) (2009).

⁹ H.R. 985, § 4(5) (2009).

¹⁰ H.R. 985, § 4(2) (2009).

In sum, NACDL respects and understands the role that an independent press plays in a free and democratic society. Were it not for a free press, much government wrongdoing would be hidden from public view. Indeed, a free press is a critical line of society's defense against law enforcement run amuck. That said, the sanctity of the rights of the often unpopular person, accused or suspected of a crime, and therefore subject to the potential loss of liberty, is paramount, and it must remain so as Congress considers passage of a Federal Reporters' Shield Law.

Sincerely,

A handwritten signature in black ink, appearing to read "John Wesley Hall". The signature is written in a cursive, flowing style.

John Wesley Hall
President, National Association of Criminal Defense Lawyers

cc: Members of Senate Judiciary Committee