



March 30, 2009

Support Free Flow of Information Act of 2009, H.R. 985, without amendment.

On behalf of the ACLU, a non-partisan organization with over half a million members, 53 affiliates, and countless additional supporters and activists nationwide, we are writing to urge you to vote in favor of H.R. 985, the Free Flow of Information Act of 2009. The bill represents a significant step in the right direction and will bring consistency to the issue of the journalists' privilege in federal proceedings.

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Due to the leadership of Representatives Boucher and Pence and a bipartisan group of co-sponsors, H.R. 985 codifies a journalists' privilege for federal court proceedings. A similar privilege is already available in forty-nine states and D.C. As the Attorneys General of 34 states and D.C. have observed, "The consensus among the States on the reporters' privilege is as universal as the federal courts of appeals decisions on the subject are inconsistent, uncertain and irreconcilable." This Act is needed to fix those problems.

H.R. 985 largely codifies existing Department of Justice guidelines for subpoenaing journalists, with one important addition. It provides for oversight by a federal court, instead of vesting unfettered discretion in the Attorney General. Events in recent years have shown what happens where that constitutional check is missing for journalists. Confidential sources broke stories about illegal government programs including torture, warrantless wiretapping, kidnapping, unlawful detention, and illicit national security letters. In retaliation, an unchecked executive branch used subpoenas to intimidate journalists into revealing their sources or intimidating them from publishing certain stories.

The approach to compelled testimony from journalists taken in H.R. 985 attempts to balance the competing interests of parties to litigation with the public interest in the free flow of information. It bars compelled reporter testimony unless a court first determines that there are no other reasonable sources and that the information is critical to a pending suit or criminal investigation. The privilege against disclosure of a source's identity is even stronger, though there are exceptions to prevent terrorism, to prevent imminent physical harm, to identify terrorists, to identify the improper release of classified materials harmful to national security, and to identify certain other unlawful actions. While we are concerned by some of the lesser exceptions, we believe the bill makes a good attempt at striking a reasonable balance between the needs of civil and criminal litigants and the rights of society to a free and flourishing press.

Notwithstanding its strengths, we also believe the bill could have been stronger. In order to gain the protection of the bill, a reporter must engage in journalism ‘regularly’ and must do so ‘for a substantial portion of [his or her] livelihood or for substantial financial gain.’ In our view, the privilege should extend to anyone who is actually engaged in journalism at the time the proposed information is being provided to the reporter. The purpose of the privilege is to protect the free flow of information to journalists and, accordingly, the motivations of the parties at the time the information is conveyed is critical. In determining whether a source will provide information to a reporter, it is far more important that the source believe the reporter is engaging in journalism than whether the reporter is getting paid or the frequency of the reporter’s journalism activities.

In addition, we are concerned that the bill does not go far enough in protecting journalists in a civil context. We recognize that the rights of the accused must be balanced with the rights of journalists. Under H.R. 985, criminal defendants can compel testimony if the information is critical to their defense. However, the bill applies the same standard to civil litigants and, for that matter, to criminal prosecutors, none of whom face the risks to individual liberty faced by criminal defendants. For that reason, those who are accused of crimes in our system of justice are assured the right to face their accusers – and therefore the reporters’ privilege must yield and represent a balancing of rights. The Constitution requires no such balancing with respect to the rights of civil litigants and, accordingly, we believe the regimen established under H.R. 985 could set a somewhat higher standard for piercing the privilege in those instances.

In sum, however, H.R. 985 is a strong step in the right direction and will provide needed clarity and consistency in the application of the reporters’ privilege in federal courts. We therefore recommend a vote in favor of the Free Flow of Information Act of 2009.

Sincerely,



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