



NOV 04 2009

The Honorable Patrick J. Leahy  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

Dear Chairman Leahy:

This letter presents the views of the Administration on the Specter-Schumer substitute amendment (HEN09B24) to S. 448, the "Free Flow of Information Act of 2009." This legislation is the result of a series of productive and cooperative discussions with the sponsors and supporters of the legislation. The Administration supports this substitute amendment and urges that no further amendments be adopted to this carefully crafted compromise.

We appreciate the critical role that the media plays in a free and democratic society. This legislation provides robust judicial protection for journalists' confidential sources, while also enabling the Government to take measures necessary to protect national security and enforce our criminal laws.

There are a number of changes from previous versions of this legislation that address concerns that the Administration has expressed.

In criminal investigations and prosecutions where the Government seeks to compel disclosure, Section 2 of S. 448 as introduced provided that a court would engage in an open-ended analysis weighing the interest in disclosure against the free flow of information. The Specter-Schumer substitute eliminates this open-ended analysis, and replaces it with a more balanced and appropriate process. First, it requires the Attorney General to certify that the request for compelled disclosure was made in a manner consistent with the guidelines in the U.S. Attorney's Manual (USAM). Second, reflecting the fact that the USAM already provides significant protections for the news media from subpoenas that might impair the newsgathering function, the Specter-Schumer substitute provides that when the court balances the interest in compelling disclosure against the interest in the free flow of information, the journalist bears the burden to establish by clear and convincing evidence that disclosure would be contrary to the public interest. (In addition to these two requirements, the substitute amendment retains a number of other elements of Section 2 of S. 448, including the requirements that the Government exhaust all reasonable alternative sources of the protected information, show there are reasonable grounds to believe a crime has occurred, and demonstrate reasonable grounds for believing that the information is essential to the investigation or prosecution.)

Moreover, the Specter-Schumer amendment provides appropriate protection for national security. If disclosure of the information in question would materially assist the Government in preventing, mitigating, or identifying the perpetrator of an act of terrorism or other significant and articulable harm to national security, the Specter-Schumer amendment provides that the balancing test contained in Section 2 of the legislation would not apply and the court would be expected to compel production of the information. The Administration supports the provision in the substitute amendment giving courts the power to determine whether the harm at issue rises to the level of an act of terrorism or other significant and articulable harm to national security, and whether the information sought by the Government would in fact materially assist in preventing, mitigating, or identifying those responsible for such harm, while giving appropriate deference to specific factual submissions by the Government.

This same basic approach would apply in criminal investigations and prosecutions of allegedly unlawful disclosure of properly classified information, where the Government is seeking information to prevent or mitigate an act of terrorism or other significant and articulable harm to national security. If the Government establishes that the information it seeks would materially assist in preventing or mitigating such harm, under the substitute amendment it will face the same conditions and court review as in other national security cases. In other leak cases, the court would have an additional role, employing the balancing test described above for criminal investigations and prosecutions generally.

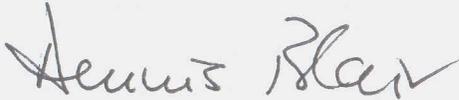
We also appreciate that the substitute addresses a number of other Administration concerns, including:

- permitting the Government to make its submissions in camera and ex parte where necessary;
- excluding from the bill's coverage authorities granted under the Foreign Intelligence Surveillance Act;
- eliminating a provision that contemplates judicial review of individual classification decisions; and
- not requiring the Government to establish that the allegedly unlawful disclosure in question was made by someone who had "authorized access to such information."

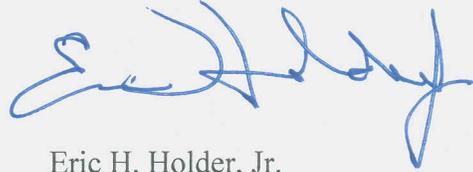
Finally, the definition of a "covered person" protected by this legislation has been much improved. First, the intent and actions necessary for a person to meet this definition are now clearly specified. Second, the definition now includes several important exclusions so that, for example, someone who is or is reasonably believed to be committing or attempting to commit the crime of terrorism or providing material support to a terrorist organization is not a "covered person." At the same time, this definition does not require a covered person to be a salaried employee of, or independent contractor to, a media organization. Over time, we expect that the courts will be able to distinguish persons entitled to the protections afforded by this statute from those who are not.

In conclusion, this legislation is a significant step forward from previous versions. The Administration supports this legislation, and the Office of Management and Budget has advised us that there is no objection to this letter from the perspective of the Administration's program.

Sincerely,

Handwritten signature of Dennis C. Blair in black ink.

Dennis C. Blair  
Director of National Intelligence

Handwritten signature of Eric H. Holder, Jr. in blue ink.

Eric H. Holder, Jr.  
Attorney General

cc: The Honorable Jeff Sessions