

September 9, 2008

Sent by Fax

To the Honorable United States Senators:

Lamar Alexander; Wayne Allard; John Barrasso; Bob Bennett; Christopher Bond;
Sam Brownback; Jim Bunning; Richard Burr; Saxby Chambliss; Tom Coburn;
Thad Cochran; Norm Coleman; Susan Collins; Bob Corker; John Cornyn; Larry Craig;
Mike Crapo; Jim DeMint; Elizabeth Dole; Pete Domenici; John Ensign; Michael Enzi;
Lindsey Graham; Chuck Grassley; Judd Gregg; Chuck Hagel; Orrin Hatch;
Kay Bailey Hutchison; James Inhofe; Johnny Isakson; Jon Kyl; Richard Lugar;
Mel Martinez; John McCain; Mitch McConnell; Lisa Murkowski; Pat Roberts;
Jeff Sessions; Richard Shelby; Gordon Smith; Olympia Snowe; Arlen Specter;
Ted Stevens; John Sununu; John Thune; David Vitter; George Voinovich; John Warner;
Roger Wicker

RE: **S.2035 – Free Flow of Information Act**

Dear Senators:

We, the undersigned Republican Attorneys General, write to express our support for the Free Flow of Information Act (S. 2035) and to request your assistance in bringing the bill to a vote before the end of the year. The Senate Judiciary Committee reported S. 2035 favorably on October 4, 2007, by a vote of 15-4. However, the bill has yet to be scheduled for a vote, likely because your support for the legislation has been an open question.

The proposed legislation allows for the protection of journalists' confidential sources, bringing federal law in line with the laws of 49 states and the District of Columbia, which already recognize such a privilege. The law does not prevent litigants or investigators from obtaining the testimony of journalists as witnesses, nor does it provide any special legal immunity for members of the media.

As Thomas Jefferson famously said to John Jay in 1786, "Our liberty cannot be guarded but by the freedom of the press, nor that be limited without danger of losing it."

This act aims to protect one of the primary functions of the first amendment: the protection of a free press and the resulting citizen oversight of government provided by the press. This sentiment was eloquently underscored by one of the House's most conservative voices,

Republican Mike Pence of Indiana. When the House passed a similar reporter's privilege bill, H.R. 2102, by a vote of 398-21, Pence led the charge:

“What's a conservative like me doing passing a bill that helps reporters?” Mr. Pence asked in the House debate last year. The answer, he said, came from his belief that “the only check on government power in real time is a free and independent press” (New York Times, May 10, 2008).

To date, 44 state attorneys general have written your offices to report on the success of state protections of journalists' sources. As our states' chief law enforcement officers, we are in a unique position to confirm that our shield laws have not resulted in any degradation in our ability to protect our citizens. Still, important provisions have been added to this legislation to carefully and thoroughly protect national security and public safety.

To guard against terrorism, this bill requires that sources be revealed when the information would assist in preventing an act of terrorism or to prosecute acts of terrorism. Sources can be disclosed when a leak of classified information poses a threat to or has already harmed national security. In addition, the definition of “covered person” has been amended by the Senate Judiciary Committee to reject terrorists and foreign agents as defined under federal law. Finally, the privilege is unavailable to any “covered persons” if they commit a crime or are an eyewitness to a crime – or if the exceptions for terrorism, national security or personal safety are triggered.¹

S. 2035 has been written to protect the secrecy of classified information. It explicitly provides for disclosure from the journalist when a leak of classified information has harmed or will harm national security.²

To defend the interests of law enforcement, the Act specifically addresses cases involving the investigation and prosecution of crimes. It requires disclosure to prevent death, kidnapping, or bodily harm. The Act would establish federal ground rules for prosecutors, civil litigants, journalists and sources, leaving in place existing procedures used in court to review a request for a media subpoena.³

As 42 attorneys general wrote to your office on June 23, 2008, “The reporter's privilege that is recognized by the laws of 50 United States jurisdictions rests on the determination that an informed citizenry and the preservation of news information sources are vitally important to a free society. By affording some degree of protection against compelled disclosure of a reporter's confidential sources, these state laws advance a public policy favoring the free flow of information to the public.”

However, our state protections are diminished by the lack of a corresponding federal law. When sources protected by state law are exposed to discovery in federal courts, our state protections –

¹ Covington & Burling LLP on behalf of the Newspaper Association of America, *Despite Continued Opposition from the Bush Administration, Congress Should Protect Reporters' Confidential Sources*, April 2008.

² Covington & Burling LLP on behalf of the Newspaper Association of America, *The Bush Administration Offers No Reason to Oppose The Free Flow of Information Act (S. 2035)* April 2008.

³ Covington & Burling LLP, *Despite Continued Opposition from the Bush Administration, Congress Should Protect Reporters' Confidential Sources*.

and the public benefits that come from a free press – are significantly damaged. That is why we are asking for your support for federal legislation that judiciously balances our need for national security with our historical support of the first amendment and a free press. That is exactly what S. 2035 does.

Support for S. 2035 has been strong in the Senate among those who work tirelessly on national security issues. Senator Susan Collins, the Ranking Republican on the Homeland Security and Government Affairs Committee, Senator Richard Lugar, the ranking Republican on the Foreign Affairs Committee, and our nominee for president, Senator John McCain, all support this legislation. It is now time for Majority Leader Reid to schedule the bill for a vote.

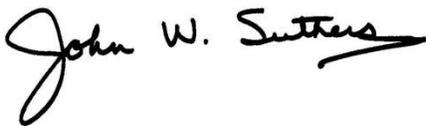
Therefore, we urge you to support the Free Flow of Information Act and to communicate that support to both the majority and minority leaders, allowing this important bill to be put on the Senate's agenda this year.

Thank you for your consideration of our views.

Sincerely,



ROB MCKENNA
Washington State Attorney General



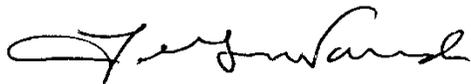
JOHN SUTHERS
Colorado Attorney General



BILL MCCOLLUM
Florida Attorney General



MARK BENNETT
Hawaii Attorney General



LAWRENCE WASDEN
Idaho Attorney General



MIKE COX
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HENRY MCMASTER
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LARRY LONG
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MARK SHURTLEFF
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