

**SOCIETY OF
PROFESSIONAL
JOURNALISTS**



SINCE 1909

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Improving
Protecting
Journalism

July 16, 2008

via E-mail

Matt Johnson
Judiciary Committee Counsel
The Hon. John Cornyn
517 Hart Senate Office Building
Washington, DC 20510

Re: *The Free Flow of Information Act (S. 2035)*

Dear Matt:

We want to thank you and the Senator again for meeting with us last week to discuss the Free Flow of Information Act. We very much appreciate your attention to the bill.

Your efforts to reach consensus on a definition of a journalist that is comprehensive and easily-applied in a court of law are to be commended. We believe that some combination of the language in the House bill and the recently-passed Hawaii shield law is up to the task, though you made it clear at our meetings that the Senator is not yet persuaded. The Senator spoke about the importance of professional practices in journalism, and while SPJ members embrace these aspirational goals for ourselves and our colleagues, we remain skeptical that the federal shield bill is the appropriate place to establish such "rules of the road" and the idea is unlikely to be well received by the broader journalistic community.

When we left you on Friday, we agreed that we would discuss alternatives to the current definition of a journalist both within SPJ and the media coalition at large. We have taken our discussion back to our membership and to the greater coalition. The consensus is, just as it was before, that no support exists for a seeks-to-verify provision in the definition of a journalist, even in exchange for some threshold showing for the prosecution before a subpoena against a journalist could issue. We encourage you to again take a look at the language Pat Butler and Marty Gold have proposed to see whether that definition is something the Senator can get behind or work off to find a mutually-acceptable definition. We hope that we will be able to say that the Senator supports the entire media community on this issue.

We have given every consideration to your concerns and agree that defining who is to be covered by the new shield law can look, at first blush, to be challenging because of the growth of the electronic and non-traditional media in recent years. But in 2006 – when the Internet revolution was well underway – the SEC adopted guidelines for the issuance of subpoenas to journalists that did not

trip up over this issue. SEC Commissioner Christopher Cox promulgated rules that simply applied to the “news media,” and he did not try to define that term. See 17 C.F.R. 202.10. The Department of Justice similarly does not define “news media” in its guidelines. See 28 C.F.R. 50.10. While these two provisions are not, of course, legally enforceable in court, we find it telling that two agencies that, to put it mildly, don’t like to have obstacles placed between them and their law enforcement functions, took no steps to cover only those persons who made efforts to verify their work prior to publishing. We understand the need for a filtering mechanism in the legislation, but we believe the way the SEC and the DOJ address that issue – by focusing on the exclusions and the balancing test in their regulations – is an effective way to limit the reach of any federal shield statute. This approach is the most likely to satisfy the Senator’s need to ensure the new law would contain some built-in “back stops” while simultaneously satisfying the desires of the journalism community not to overwork the definition of who is a journalist.

The definition of a journalist, SPJ believes, is inherently fluid and can only be effectively and pragmatically implemented by a simple functional test. Both SPJ and the coalition stand behind such a definition and encourage the Senator to support the bill as it moves forward. On behalf of our membership of nearly 10,000 journalists, we thank you again for the opportunity to meet with you and the Senator. Please let us know if we can be of further assistance to you in your consideration of the bill.

Yours very truly,

A handwritten signature in cursive script that reads "Clint Brewer". The signature is fluid and extends across the width of the text area.

Clint Brewer
President

cc: Bruce Sanford
Bruce Brown
Laurie Babinski
Paul Boyle