



H.R. 2102 – Free Flow of Information Act of 2007

EXECUTIVE SUMMARY

H.R. 2102 was introduced by Representative Rick Boucher (D-VA) on May 5, 2007. The bill was ordered reported, as amended, by voice vote, from the Committee on the Judiciary on October 10, 2007. The bill establishes new federal protections for journalists and specific criteria that federal entities must meet in order to compel a journalist to testify or to produce any documents related to information obtained or created by that journalist as part of engaging in journalism.

The criteria that a federal entity must meet in order to compel a journalist's testimony include, for example: proving that the testimony or document sought is critical to the prosecution's investigation or proving that the testimony is necessary to prevent an act of terrorism against the United States. Under H.R. 2102, if a federal entity is not able to prove that a case involving a journalist meets all of the applicable criteria, then the federal entity may not compel the journalist to provide testimony.

The Department of Justice stated that given the extensive safeguards already in place, the Department strongly opposes H.R. 2102 and similar legislative efforts to provide a "journalist's privilege" that would prevent the disclosure of relevant testimony and evidence critical to the fair disposition of investigations and trials." Judiciary Committee Ranking Member Lamar Smith (R-TX) said "we should continue to improve this bill before we go to the House floor. If the legitimate security concerns registered by the Department are addressed at that time then I will support H.R. 2102."

Representatives Mike Pence (R-IN), Howard Coble (R-NC), and Greg Walden (R-OR) circulated a letter supporting passage of H.R. 2102 stating that "Passage of the Free Flow of Information Act is vital to maintaining a free and independent press in the United States."

FLOOR SITUATION

H.R. 2102 is being considered on the floor pursuant to a structured rule. The rule:

- Provides one hour of general debate equally divided and controlled by the Chairman and Ranking Republican Member of the Committee on the Judiciary.
- Waives all points of order against consideration of the bill except those arising under clause 9 (earmarks) and 10 (PAYGO) of Rule XXI.

- Provides that the amendment in the nature of a substitute recommended by the Committee on the Judiciary, shall be considered as adopted and the bill, as amended, shall be considered as read.
- Waives all points of order against provisions of the bill, as amended. This waiver does not affect the point of order available under clause 9 (earmarks) of rule XXI.
- Provides that the amendment printed in the Rules Committee report shall be in order if offered by Rep. Boucher (D-VA) or his designee. (See Amendments Section below)
- Provides that the amendment made in order shall not be subject to demand for division of the question, shall be considered as read, and shall be debatable for ten minutes equally divided and controlled by the proponent and an opponent.
- Waives all points of order against the amendment printed in Rules Committee report except those arising under clause 9 (earmarks) and 10 (PAYGO) of Rule XXI.
- Provides one motion to recommit with or without instructions.
- Provides that, notwithstanding the operation of the previous question, the Chair may postpone further consideration of the bill to a time designated by the Speaker.

This legislation was introduced by Representative Rick Boucher (D-VA) on May 5, 2007. The bill was ordered reported, as amended, by voice vote, from the Committee on the Judiciary on October 10, 2007.

This legislation is expected to be considered on the floor of the House of Representatives on October 16, 2007.

**Note: Similar legislation was introduced in the 109th Congress by Representative Mike Pence (R-IN) which was referred to the Committee on the Judiciary, but was not acted on.*

SUMMARY

H.R. 2102 establishes new federal protections for journalists and the bill states that the protections apply to a 'covered person' meaning "a person who, for financial gain or livelihood, is engaged in journalism and includes a supervisor, employer, parent, subsidiary, or affiliate of such covered person." Below 'journalist' is used in place of 'covered person.'

Establishing a Federal Judicial Privilege for Journalists

The bill establishes that in order for any *federal entity** to compel a journalist to testify or to produce any documents related to information obtained or created by that journalist as

part of engaging in *journalism**, that the federal entity must meet all of the applicable following criteria:

**Note: The bill defines a federal entity as “an entity or employee of the judicial or executive branch or an administrative agency of the Federal Government with the power to issue a subpoena or issue other compulsory process.”*

**Note: The bill defines journalism as “the gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing or news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public.”*

- The federal entity seeking to compel production of the testimony or document has exhausted all reasonable alternative sources of the testimony or document.
- In a criminal investigation or prosecution, based on information obtained from a person other than that journalist, that there are reasonable grounds to believe that a crime has occurred, and the testimony or document sought is critical to the investigation or prosecution, or to the defense against the prosecution.
- The testimony or document sought is critical to the completion of a matter other than a criminal investigation or prosecution.
- In the case that the testimony or document sought could reveal the identity of a source of information, or include any information that could reasonably be expected to lead to the discovery of the identity of a source, that disclosure of the identity of such a source is necessary to:
 - Prevent an act of terrorism against the United States;
 - Prevent imminent death or significant bodily harm; or,
 - Identify a person who has disclosed a trade secret, individually identifiable health information, or private, personal information.
- The public interest in compelling disclosure of the information or document involved outweighs the public interest in gathering or disseminating news or information.

Under H.R. 2102, if a federal entity is not able to prove that a case involving a journalist meets all of the applicable criteria above, then the federal entity may not compel the journalist to provide testimony or any documents obtained or created by that journalist as part of engaging in journalism.

The bill further requires that any testimony or document that is compelled by a federal entity shall not be “overbroad, unreasonable, or oppressive and, as appropriate, be limited to the purpose of verifying published information or describing any surrounding

circumstances relevant to the accuracy” of published information and be “narrowly tailored in subject matter and period of time covered as to avoid compelling production of peripheral, nonessential, or speculative information.”

H.R. 2102 establishes that in order for any federal entity to compel an information service or content provider, telecommunications carrier, or “any person that transmits information of the customer’s choosing by electronic means” to testify or to disclose a document that relates to a business transaction between that provider and a covered journalist. The federal entity must first determine that they have met the conditions enumerated above and must issue notice* to the provider of the subpoena when it is issued and also must ensure that the provider has an opportunity to be heard before the court prior to the time at which the testimony or disclosure is compelled.

**Note: H.R. 2102 establishes an exemption to the notice requirement in the event that the court determines by clear and convincing evidence that such notice would pose a substantial threat to the integrity of a criminal investigation.*

Foreign Powers and Terrorist Organizations

The privileges established in H.R. 2102 specifically do not apply to any person who is an agent of a foreign power or to any organization designated by the Secretary of State as a foreign terrorist organization.

BACKGROUND

State Laws

49 States and the District of Columbia have adopted a judicial privilege for journalists in some form, allowing journalists to refuse to testify in some instances, 33 of those states have adopted the privilege by statute, and 16 have done so by court decision.

Federal Law

Journalists have no privilege in Federal Court.

Supreme Court

In 1972, in the only opinion the Supreme Court has written on the subject of journalists’ privilege, in the decision the case of *Branzburg v. Hayes* in which a reporter was served a subpoena to reveal source information before a grand jury in a criminal investigation, the Court held that the 1st Amendment to the Constitution does not provide even a qualified privilege for journalists to refuse “to appear and testify before state or federal grand juries.”

The Federal court of appeals cited *Branzburg v. Hayes* when it refused to overturn the charges of civil contempt against journalists Judith Miller and Matthew Cooper for refusing to give evidence in response to subpoenas served by Special Counsel Patrick Fitzgerald in his investigation of the disclosure of the identity of CIA agent Valerie Plame. After the Supreme Court refused to review the decision, Matthew Cooper agreed to testify, but Judith Miller refused and served 85 days in jail until her informant, Lewis Libby, gave her permission to reveal his identity. ([CRS: RL34193](#))

The Department of Justice reports that since 1991, the Department has issued 19 subpoenas to reporters seeking confidential source information.

AMENDMENTS

(The amendment summary below appears as it is printed on the [Republican Rules Committee Website](#))

Representative Rich Boucher (D-VA): The amendment provides that the disclosure of a leaker's identity can be compelled in cases involving leaks of properly classified information. It also permits law enforcement to obtain an order compelling disclosure of documents and information obtained as the result of eyewitness observations of alleged criminal or tortuous conduct. It also limits the Act's coverage to a person who "regularly" engages in the listed journalistic activities. Finally, it adds three new exceptions to the definition of "covered person."

**Note: Republican staff at the Committee on the Judiciary noted that this amendment also creates three other categories of terrorists or terrorist organizations that do not qualify for the privilege.*

ADDITIONAL VIEWS

Judiciary Committee Ranking Member Lamar Smith (R-TX) published a statement in the Committee Report on H.R. 2102 explaining that the Department of Justice (DoJ) opposes H.R. 2102 and DoJ believes that "the stakes are too high in a post 9/11 world to support the Free Flow of Information Act." Ranking Member Smith said further that "we must weigh the benefits of a reporter's privilege with the problems it may cause for those who protect our country." Ranking Member Smith's statement illustrated that he is concerned that,

"[T]he legislation prevents DoJ from obtaining the identity of a news source with knowledge of a child prostitution ring, an online purveyor of pornography, gang violence, or alien smuggling. And the new text governing source disclosure exceptions only addresses prospective events. The Department may be able to acquire information about a source's identity to prevent a terrorist attack. But the language does not help if an attack has already occurred and DoJ is searching for plotters or witnesses with knowledge about the event. Also, the H.R. 2102 does not address 'imminent attacks' against our allies, soldiers, embassies, and US citizens in other countries. It protects trade secrets, but not national secrets."

Rep. Smith said "I am concerned that the Department will be hamstrung as it goes about the business of conducting investigations and prosecuting criminals...I simply believe we must err on the side of caution and not support legislation that could make it harder to apprehend criminals and terrorist or deter their activities." The Ranking Member closed by stating "...we should continue to improve this bill before we go to the House floor. If the legitimate security concerns registered by the Department are addressed at that time then I will support H.R. 2102."

The Department of Justice

In a letter to Representative Lamar Smith (R-TX), from the Principal Deputy Assistant Attorney General dated September 11, 2007, DoJ states that “Given the extensive safeguards already in place, the Department strongly opposes H.R. 2102 and similar legislative efforts to provide a “journalist’s privilege” that would prevent the disclosure of relevant testimony and evidence critical to the fair disposition of investigations and trials.”

Republican Support for H.R. 2102

A Dear Colleague letter circulated by Representatives Mike Pence (R-IN), Howard Coble (R-NC), and Greg Walden (R-OR) states that “Passage of the Free Flow of Information Act is vital to maintaining a free and independent press in the United States.” The letter says that this bill “ensures that journalists possess the ability, except in certain situations, to keep the identity of sources confidential and report appropriate information to the American public without fear of intimidation or imprisonment.” The letter goes on to say that the bill “sets criteria that must be met to compel the disclosure of sources and information from journalists in a federal criminal or civil matter.”

The Bush Administration

The Statement of Administration Policy on H.R. 2102 issued on October 16, 2007 stated, “The Administration believe strongly in the importance and rights of a free press; however, based on the overriding imperative to protect national security, the Administration strongly opposes H.R. 2102. The bill would provide a broad privilege to a large class of “covered persons” that could severely frustrate – and in some cases completely eviscerate – the Federal government’s ability to investigate acts of terrorism and other threats to national security. Accordingly, if H.R. 2102 were presented to the President in its current form, his senior advisors would recommend that he veto the bill.”

COST

The Congressional Budget Office (CBO) estimates that implementing H.R. 2102 would have no significant effect on the Federal budget. CBO’s cost estimate explained that “Under current law, requests to subpoena journalists on matters related to Federal cases typically originate within the Department of Justice (DOJ). Federal prosecutors can request a subpoena of a journalist from a court after an internal review by DOJ. Information from DOJ indicates that very few subpoena requests seeking confidential source information are approved each year and that the bill would not substantially change the number of such requests. The bill might increase Federal attorneys' litigation duties, but CBO estimates that any increase in Federal spending would be insignificant. In addition, based on information from the Administrative Office of the United States Courts, CBO expects that the bill would not appreciably increase the courts' workloads. Therefore, CBO estimates that implementing H.R. 2102 would have no significant budgetary impact.”

ADDITIONAL INFORMATION

[RL34193 - Journalists' Privilege: Overview of the Law and Legislation in the 109th and 110th Congresses](#)

[CBO Cost Estimate on H.R. 2102](#)

STAFF CONTACT

For more information or questions please contact Matt Lakin at (202) 226-2302.