

Discussion Points
S. 448 – Free Flow of Information Act
August 2010

- We are meeting with you to encourage your support for Senate action on the federal shield bill (S. 448, Free Flow of Information Act).
- S. 448 is a bipartisan bill sponsored by Sens. Lugar, Graham, Schumer, Leahy and Specter.
- The legislation is supported by over 70 media companies and journalism organizations.
- Journalists face escalating pressure to reveal the identity of sources who have been promised confidentiality. Subpoenas from prosecutors, criminal defendants, and civil litigants against television, newspaper and online journalists continue to mount.
 - In April, the Justice Department resurrected a subpoena to Pulitzer Prize-winning *New York Times* reporter James Risen.
 - A subpoena issued by a civil litigant to Pulitzer Prize-winning *Detroit Free Press* reporter David Ashenfelter is still pending after three years of litigation.
- Journalists often have no other choice but to rely on confidential sources when writing stories of vital public interest.
 - Mr. Risen revealed to the public that the CIA intended to give Iranian scientists flawed technical specifications but may have in fact shared with them valuable nuclear technology.
 - Mr. Ashenfelter revealed to the public that a federal prosecutor was under investigation for possible serious misconduct during a high-profile terrorism trial.
- Senate action is needed to protect the public's right to know by enabling journalists – in limited circumstances – to protect the identities of confidential sources so that government and corporate whistleblowers will come forward to identify waste, fraud and other wrongdoing.
- A federal shield law would not create procedural hurdles for the government when seeking information in an investigation or prosecution. A federal shield law would harmonize the law across all federal jurisdictions, creating consistent and clear rules for judges, those who issue subpoenas (i.e., prosecutors, criminal defendants, and civil litigants), journalists, and – most importantly – for potential sources.
- S. 448 has been modified considerably over the past six years to address national security concerns. The bill contains extremely broad exceptions when the government seeks information that could thwart a terrorist attack or otherwise prevent harm to national security.

- A federal shield law would not encourage more government leaks. With a clear legal framework for when a journalist can and cannot protect a source, both journalists and potential leakers will likely be more mindful of whether public disclosure of confidential or classified information will truly serve the public interest.
- S. 448 passed the Senate Judiciary Committee in December 2009 by a 14-5 bipartisan vote. A similar bill passed the House of Representatives – twice by wide margins.
- This bipartisan legislation supports the principle that a free and democratic society cannot survive without an informed citizenry. It is time for the Senate to act on this long overdue legislation.
- We ask that you not only support the legislation – but that you also indicate to the Senate leadership that you will support cloture so that there can be an up-or-down vote on the merits of the bill.

Responses to Questions on Wikileaks:

- Posting raw data is not the same as doing journalism.
 - The important role professional journalists play in our democracy cannot be replaced by websites that publish source documents without editorial oversight (e.g., fact-checking, evaluating the motivations of the source, assessing likelihood of harm), as well as the additional research, analysis and contrasting viewpoints that are so essential for public understanding.
- Even if Wikileaks were considered a journalism organization (and the government could obtain the authority to subpoena the website), national security exceptions in the bill would prevent Wikileaks from being able to protect its confidential source.
- Court decisions in recent years have put in doubt whether professional journalists can protect confidential sources. With more legal clarity, potential leakers may find working with a professional, experienced journalist more compelling – and thus may be less inclined to upload classified documents to a faceless website.
- The need for a federal shield law still exists. Actual working journalists are still getting subpoenaed for the identities of their confidential sources (e.g., James Risen, David Ashenfelter and scores of other subpoenas from civil litigants).
- The big-picture goal is to create uniform rules, across all federal jurisdictions/courts, to clarify when a source can and cannot be protected.