

Legislative Bulletin.....March 31, 2009

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H.Res. 290 – Honoring the lives and mourning the loss of Sergeant Mark Dunakin, Sergeant Ervin Romans, Sergeant Daniel Sakai, and Officer John Hege, Members of the Oakland Police Department in California who were brutally slain in the line of duty (*Lee, D-CA*)

Order of Business: The resolution is scheduled to be considered on Tuesday, March 31, 2009, under a motion to suspend the rules and pass the resolution.

Summary: H.Res. 290 would resolve that the House of Representatives:

- “Extends its condolences to the families and loved ones of Oakland Police Department Sergeant Mark Dunakin, Sergeant Ervin Romans, Sergeant Daniel Sakai, and Officer John Hege and stands in solidarity with the people of Oakland, California, their neighbors in the East Bay, and entire Bay Area community, as they celebrate the lives, and mourn the loss, of these 4 remarkable and selfless heroes who represented the best of their community and the future the people of Oakland are determined to create for their children, grandchildren, and generations to come.”

The resolution lists a number of findings including:

- “Since May 17, 1792, when Deputy Sheriff Isaac Smith of the New York City Sheriffs Office was killed, more than 18,270 Federal, State, and local law enforcement officers have died in the line of duty;

- “On Saturday, March 21, 2009, in Oakland, California, Sergeant Mark Dunakin, Sergeant Ervin Romans, Sergeant Dan Sakai, and Officer John Hege, all of the Oakland Police Department, were killed by gunfire while serving in the line of duty;
- “The senseless slaying of Sergeants Dunakin, Romans, and Sakai, and Officer Hege represents the first multiple-fatality shooting incident of law enforcement officers in the United States in more than a year, and the first time in more than 15 years that 4 law enforcement officers were killed by gunfire in the line of duty in a single incident;
- “The killing of Sergeants Dunakin, Romans, and Sakai, and Officer Hege represents the deadliest incident involving California public safety officers since the infamous ‘Newhall Incident’ occurred nearly 40 years ago in Los Angeles County on April 6, 1970, when 4 California highway patrolmen were killed in a gun battle with 2 heavily armed suspects, an incident so traumatic and shocking to the Nation that it galvanized the movement to reform police training procedures, firearms use, and arrest techniques...”

Committee Action: H.Res. 290 was introduced on March 26, 2009 and referred to the House Committee on the Judiciary. No further public action was taken.

Cost to Taxpayers: The resolution would not authorize any additional expenditures.

Does the Bill Expand the Size and Scope of the Federal Government?: No.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: No.

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H.R. 985 – Free Flow of Information Act of 2009 (*Boucher, D-VA*)

Order of Business: H.R. 985 is expected to be considered on Tuesday, March 31, 2009, on a motion to suspend the rules and pass the bill. H.R. 985 is the same bill as H.R. 2102, which passed the House of Representatives in the 110th Congress by a vote of [398-21](#).

Summary: H.R. 985 would prohibit a federal entity from compelling a covered person (see below for definition) to testify or produce any document unless a court requires such.

Section 2. H.R. 985 establishes a procedure in which a federal entity may force the disclosure of confidential information from a journalist and specifies that a federal entity may not force a journalist to testify or provide documents that belong to the journalist (either obtained or created by them), unless the following conditions are met:

- The party seeking to produce the documents must exhaust “all reasonable alternative sources of the testimony or document.”

- If the documents are to be used in a criminal investigation or prosecution, documents may be required if there is “reasonable ground” to believe that a crime has occurred, if “the testimony or document sought is critical to the investigation or prosecution or to the defense against the prosecution.”
- If the documents are part of something other than a criminal investigation or prosecution (i.e. a civil investigation), the testimony or documents sought must be critical to the successful completion of the case.
- If the documents under consideration would 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 such a source”, documents can only be required disclosed if:
 - they would “prevent an act of terrorism against the United States or its allies or other significant and specified harm to national security with the objective to prevent such harm”;
 - the disclosure is necessary to prevent imminent death or significant bodily harm;
 - disclosure of the identity of such a source is necessary to identify a person who has disclosed a trade secret, actionable under section 1831 or 1832 of title 18, United States Code; individually identifiable health information, as such term is defined in section 1171(6) of the Social Security Act (42 U.S.C. 1320d(6)), actionable under Federal law; or nonpublic personal information, as such term is defined in section 509(4) of the Gramm-Leach-Bliley Act (15 U.S.C. 6809(4)), of any consumer actionable under Federal law.
- If the party seeking such documents can prove that the public interest in compelling disclosure of the information or document involved outweighs the public interest in gathering or disseminating news or information.

H.R. 985 places a limit on the content of the information, stating that it must not be “overbroad, unreasonable, or oppressive and, as appropriate, be limited to the purpose of verifying published information describing any surrounding circumstances relevant to the accuracy of such published information.” In addition, the information must be “narrowly tailored in subject matter and period of time covered so as to avoid compelling production of peripheral, nonessential, or speculative information.”

Section 3. This section sets the requirements in cases where the federal entity is attempting to retrieve information from a communication service provider (CSP) regarding a transaction between the CSP and the covered person. The limitations in section 2 of the bill apply to these documents as well. Section 3 clarifies that testimony or documents acquired from the CSP of a non-covered person are *not* protected.

This section also defines the procedures for the notice and hearing given to a covered person. According to this section, a court may compel testimony or disclosure of documents only after a “notice of the subpoena or other compulsory request for such testimony or disclosure from the CSP” is provided to the covered person, and after they have an opportunity to be heard before the court before the disclosure is compelled.

H.R. 985 sets an exception to such notice if the “court involved determines by clear and convincing evidence that such notice would pose a substantial threat to the integrity of a criminal investigation.”

Section 4. H.R. 985 defines the following terms:

Communication Service Provider: “any person that transmits information of the customer's choosing by electronic means; and includes a telecommunications carrier, an information service provider, an interactive computer service provider, and an information content provider (as such terms are defined in sections 3 and 230 of the Communications Act of 1934 (47 U.S.C. 153, 230)).”

Covered Person: “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. Such term shall not include any person who is a foreign power or an agent of a foreign power, as such terms are defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801); or any organization designated by the Secretary of State as a foreign terrorist organization in accordance with section 219 of the Immigration and Nationality Act (8 U.S.C. 1189).”

Document: “writings, recordings, and photographs, as those terms are defined by Federal Rule of Evidence 1001 (28 U.S.C. App.).”

Federal Entity: “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.”

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

Additional Information:

One case has been ruled on journalists' privilege in the Supreme Court. In the case, *Branzburg v. Hayes*, a reporter was issued a subpoena to reveal source information before a grand jury in a criminal investigation. According to the ruling, the court decided that there was no constitutional or common law privilege for a reporter to shield the identity of sources from a grand jury, with one exception being that the First Amendment allows the privilege in a grand jury investigation conducted in the absence of good faith. However, the Court stated that “reporters, like any other citizens, [must] respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.”

According to the House Judiciary Committee, “*In re: Grand Jury Subpoena* is the federal court of appeals decision that declined to overturn the finding of civil contempt against journalists Judith Miller and Matthew Cooper for refusing to produce subpoenaed evidence regarding the identity of CIA agent Valerie Plame. The Supreme Court declined

to review the decision. As a result, Matthew Cooper agreed to testify, but Judith Miller refused and spent time in prison on contempt charges. The court cited *Branzburg* and held that the First Amendment does not permit journalists to refuse to testify before a grand jury.”

Currently, 49 states have adopted laws to provide a journalists’ privilege. While all considerably different, each state law protects the identity of a reporter’s confidential sources in some form.

Proponents of the bill argue: The media serves as a “public watchdog.” It provides a service to the public by frequently disclosing abuses in government and the private sector. In order to achieve this goal, sources need anonymity. Without anonymity, sensitive information, which the public has a right to know about, might not be given to journalists.

The bill has been refined since the 109th Congress to include protections for trade secrets, people threatened with bodily harm, and information related to national security. Exceptions in this bill prevent information that is vital to national security from being protected by a Media Shield law.

Possible Conservative Concerns: Some conservatives may be concerned about a federal definition of journalist and journalism that could render this legislation applicable to a much broader array of people than intended. In addition, since 1991, the DoJ reports that they have issued 19 subpoenas to reporters seeking confidential source information, and according to the House Judiciary Committee, the Reporters Committee for Freedom of the Press announced last fall that in the previous 20 years, 16 journalists have been jailed over privilege claims. Some conservatives may question the need for this legislation, which arguably may increase the difficulty in prosecuting those who leak classified information. For instance, Ranking Member of the House Judiciary Committee Lamar Smith, an RSC Member, is opposed to the bill and states the following concerns highlighted in the committee report from the 110th Congress:

- “...the 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.”
- “...the language does not help if an attack has already occurred and DoJ is searching for plotters or witnesses with knowledge about the event.”

Additionally, under the Bush Administration, the Department of Homeland Security, the Department of Justice, and the Director of National Intelligence were all opposed to the bill because they believed it would threaten the federal government’s ability to find, prosecute, and stop those that threaten the United States. The same Departments under the Obama Administration have not indicated whether they will support the bill.

Opponents also believe that the sources who are most concerned about the risk of being exposed will be those who either have engaged or plan to engage in a criminal act by disclosing the information to a reporter.

Finally, many opponents state that the press flourishes without the existence of the privilege outlined in this bill.

Statement of Administration Policy (SAP): No SAP was available at press time.

Committee Action: H.R. 985 was introduced on February 11, 2009, and was referred to the Committee on the Judiciary. On March 25, 2009, a mark-up was held in Committee and the bill was reported, as amended, by voice vote.

Cost to Taxpayer: No CBO report for H.R. 985 is available. However, CBO scored H.R. 2102 from the 110th Congress as having no significant impact on the federal budget.

Does the Bill Expand the Size and Scope of the Federal Government?: Yes. The bill would expand current law to set new federal standards and exceptions for the disclosure of evidence and documents from covered sources.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: No.

Does the Bill Comply with House Rules Regarding Earmarks/Limited Tax Benefits/Limited Tariff Benefits?: No committee report was available at press time for H.R. 985. However, last year's bill stated that "in accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 2102 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of rule XXI."

Constitutional Authority: No committee report was available for H.R. 985. However, last year's bill stated the authority as: Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, section 8, clause 18 of the Constitution and the First Amendment. Article I, Section 8, Clause 18 states that Congress has the authority "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department of Officer thereof." No foregoing power is sighted.

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H.R. 1029 – Alien Smuggling and Terrorism Prevention Act of 2009
(Hill, D-IN)

Order of Business: H.R. 1029 is expected to be considered on Tuesday, March 31, 2009, on a motion to suspend the rules and pass the bill. H.R. 1029 is similar to H.R. 2399, which passed the House of Representatives in the 110th Congress by a vote of 412-0, with 6 voting present.

Summary: H.R. 1029 would require that the Department of Homeland Security, to the best of its ability, check all alien smugglers and smuggled individuals that are interdicted in the United States.

The legislation would also add language to the section of U.S. Code that covers bringing in and harboring certain aliens in order to specifically criminalize the “Smuggling of Unlawful Terrorist Aliens.” H.R. 1029 would stipulate that anyone who knowingly brings, recruits, encourages, transports, harbors, or conceals any alien smuggler could be punished by fines described in Title 18 and by imprisonment of up to 30 years depending on the type of offense. Those who attempt to kidnap or kill someone while committing a crime under this section will be subject to a life sentence.

H.R. 1029 would also amend maritime law enforcement under Title 18 to require that anyone who violates alien transportation laws within the jurisdiction of maritime law enforcement will be subject to fines and imprisonment between five years and life depending on the nature of the crime.

The bill would subject all sentencing guidelines to review of the United States Sentencing Commission, which is permitted to provide sentencing enhancements or stiffen existing enhancements in certain circumstances. H.R. 1029 would prohibit an accused violator of provisions in the bill from using “necessity” as a defense unless the accused contacted the Coast Guard or other law enforcement as soon as possible and did not knowingly facilitate the entry of an illegal alien.

H.R. 1029 also lists the following findings:

- “...Existing penalties for alien smuggling are insufficient to provide appropriate punishment for alien smugglers.
- “Existing alien smuggling laws often fail to reach the conduct of alien smugglers, transporters, recruiters, guides, and boat captains.
- “Existing laws concerning failure to heave to are insufficient to appropriately punish boat operators and crew who engage in the reckless transportation of aliens on the high seas and seek to evade capture.
- “Much of the conduct in alien smuggling rings occurs outside of the United States. Extraterritorial jurisdiction is needed to ensure that smuggling rings can be brought to justice for recruiting, sending, and facilitating the movement of those who seek to enter the United States without lawful authority.”

Additional Information: According to a 2005 GAO study on illegal alien smuggling, “Globally, alien smuggling generates billions of dollars in illicit revenues annually and poses a threat to the nation’s security. Creation of the Department of Homeland Security

(DHS) in March 2003 has provided an opportunity to use financial investigative techniques to combat alien smugglers by targeting and seizing their monetary assets... GAO suggests that the Attorney General consider developing and submitting to Congress a legislative proposal, with appropriate justification, for amending the civil forfeiture authority for alien smuggling.” H.R. 1029 is meant to toughen existing laws on alien smuggling and to define laws in certain jurisdictions.

Statement of Administration Policy (SAP): No SAP was available at press time.

Committee Action: H.R. 1029 was introduced on February 12, 2009, and was referred to the Committee on the Judiciary and the House Committee on Homeland Security Subcommittee on Border, Maritime, and Global Counterterrorism. No further public action was taken.

Cost to Taxpayer: No CBO report for H.R. 1029 is available.

Does the Bill Expand the Size and Scope of the Federal Government?: The bill defines new punishments for the specific crime of alien smuggling.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: No.

Does the Bill Comply with House Rules Regarding Earmarks/Limited Tax Benefits/Limited Tariff Benefits?: No committee report is available.

Constitutional Authority: No committee report is available.

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H.R. 838 – Miami Dade College Land Conveyance Act (Ros-Lehtinen, R-FL)

Order of Business: H.R. 838 is expected to be considered on Tuesday, March 31, 2009, on a motion to suspend the rules and pass the bill.

Summary: H.R. 838 would convey, to Miami Dade College in Florida, a parcel of land held by the Bureau of Prisons for a new educational building that includes a parking area with designated parking spaces for the Bureau of Prisons. The land is approximately 47,500 square feet.

If the Attorney General determines that the conveyed property is not being used according to its stated purpose, the land will be reverted to the United States government.

Additional Information: According to the Judiciary Committee, the land to be conveyed is currently just used for parking, and the Bureau of Prisons is supportive of this legislation.

Statement of Administration Policy (SAP): No SAP was available at press time.

Committee Action: H.R. 838 was introduced on February 3, 2009, and was referred to the Committee on the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security. No further public action was taken.

Cost to Taxpayer: No CBO score for H.R. 838 is available.

Does the Bill Expand the Size and Scope of the Federal Government?: No.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: No.

Does the Bill Comply with House Rules Regarding Earmarks/Limited Tax Benefits/Limited Tariff Benefits?: No committee report was available at press time for H.R. 838.

Constitutional Authority: No committee report was available for H.R. 838.

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H.Con.Res. 54 – Permitting the use of the Rotunda of the Capitol for a ceremony as part of the commemoration of the days of remembrance of victims of the Holocaust (*Waxman, D-CA*)

Order of Business: The resolution is scheduled to be considered on Tuesday, March 31, 2009 under a motion to suspend the rules and pass the resolution.

Summary: H.Con.Res. 54 would resolve that “The Rotunda of the Capitol is authorized to be used on April 23, 2009, for a ceremony as part of the commemoration of the days of remembrance of victims of the Holocaust. Physical preparations for the ceremony shall be carried out in accordance with such conditions as the Architect of the Capitol may prescribe.”

Committee Action: H.Con.Res 54 was introduced on February 13, 2009, and referred to the Committee on House Administration, which took no official action.

Administration Position: No Statement of Administration Policy (SAP) is available.

Cost to Taxpayers: The resolution would not authorize any additional expenditures.

Does the Bill Expand the Size and Scope of the Federal Government?: No.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: No.

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H.R. 151 – Daniel Webster Congressional Clerkship Act of 2009 (Lofgren, D-CA)

Order of Business: H.R. 151 is expected to be considered on Tuesday, March 31, 2009, on a motion to suspend the rules and pass the bill. This bill is identical to H.R. 6475, which passed the House in the 110th Congress without objection.

Summary: H.R. 151 would establish a new program, known as the Daniel Webster Congressional Clerkship Program, to give young lawyers clerkships in the House of Representatives. In addition, the legislation would authorize the House Committee on Administration and Senate Committee on Rules and Administration to select at least six clerks to participate in the program for each chamber annually. The bill would authorize “such sums” to pay the salaries of each of the twelve (or more) clerks during their one-year term.

H.R. 151 would require that clerks are selected to be in the program based on:

- An excellent academic record;
- A strong record of achievement in extracurricular activities;
- A demonstrated commitment to public service; and
- Outstanding analytic, writing, and oral communication skills.

The bill would also stipulate that an equal number of clerks must work for the minority and the majority parties at any given time. According to H.R. 151, each clerk would receive a one-year compensation equal to “an individual who holds the position of a judicial clerkship for the United States District Court for the District of Columbia within 3 months of graduating from law school.” While there was no CBO score for this year’s bill, for an identical bill which passed the House last year, CBO estimated that the average one-year salary for clerks in the program would likely be approximately \$60,000 plus benefits.

Additional Background: According to findings listed in the bill, other federal branches and departments conduct similar clerkship programs that offer recently graduated law students an opportunity to work in government. The text of the bill states that “the White House, the administrative agencies of the Executive Branch, the Administrative Office of the United States Courts, the Federal Judicial Center, and the United States Sentencing Commission, all operate analogous programs for talented young professionals at the outset of their careers.” The findings go on to say that the program would benefit

Congress, as well as the law students by involving the nation's best, young law students to work in the legislative process.

Possible Conservative Concerns: Some conservatives may be concerned that H.R. 151 would authorize “such sums” to pay promising lawyers to participate in a newly created clerkship program in the House of Representatives. Some conservatives may feel that the clerkship program is superfluous and that taxpayer funds may be better utilized on other government expenditures—or by being returned to the taxpayers—rather than on new programs for law school graduates.

Statement of Administration Policy (SAP): No SAP was available at press time.

Committee Action: H.R. 151 was introduced on January 6, 2009, and was referred to the Committee on the House Administration. The bill was marked up and reported out of committee by voice vote on March 25, 2009.

Cost to Taxpayer: No CBO score for H.R. 151 is available. However, in the 110th Congress, CBO estimated that H.R. 6475 (identical to this year's bill) would cost approximately \$1 million per year.

Does the Bill Expand the Size and Scope of the Federal Government?: No.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: This bill would create a new federal clerkship program.

Does the Bill Comply with House Rules Regarding Earmarks/Limited Tax Benefits/Limited Tariff Benefits?: No committee report is available.

Constitutional Authority: No committee report is available.

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H.R. 1299 – Capitol Police Administrative Technical Corrections Act of 2009 (*Brady, D-PA*)

Order of Business: H.R. 1299 is expected to be considered on Tuesday, March 31, 2009, on a motion to suspend the rules and pass the bill. A similar bill, H.R. 5972, was passed by voice vote in the 110th Congress.

Summary: H.R. 1299 would clarify a number of the administrative authorities of the Chief of the Capitol Police, including the Chief's role in determining compensation, approving hiring and terminations, and appointing police officials.

The bill makes clarifying changes to the already existing position of Chief Administrative Officer, who would be appointed by the Chief of the Capitol Police and be paid \$1,000

less than the Chief annually. The bill would also require the Chief of the Capitol Police to give notice to the House and Senate Committees on Administration before hiring, firing, or promoting an officer. In addition, the Chief would be required to notify the House and Senate Committees on Administration prior to making advance payments to Capitol Police Officers for subscription services. The bill would also repeal a requirement that officers must buy their own uniforms.

Additional Background: According to the Office of Personnel Management (OPM), the Capitol Police was established in Congress in 1828 for the sole purpose of protecting the U.S. Capitol Building. Today, the mission of the Capitol Police has grown to “provide the Congressional community and its visitors with the highest quality of a full range of police services.” The Capitol Police are funded through the annual Legislative Branch Appropriation bill, and they are regulated by Congress directly. Therefore, a federal law must be passed to change an aspect of Capitol Police administration.

According to the Committee, the House Administration Committee worked closely with the Capitol Police to draft this bill. The Capitol Police are supportive of H.R. 1299.

Statement of Administration Policy (SAP): No SAP was available at press time.

Committee Action: H.R. 1299 was introduced on March 4, 2009, and was referred to the Committee on the House Administration. The bill was marked up and reported out of committee by voice vote on March 25, 2009.

Cost to Taxpayer: No CBO score for H.R. 1299 is available. According to CBO, an identical bill from the 110th Congress, H.R. 5972, would have no impact on mandatory or discretionary spending.

Does the Bill Expand the Size and Scope of the Federal Government?: No.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: No.

Does the Bill Comply with House Rules Regarding Earmarks/Limited Tax Benefits/Limited Tariff Benefits?: No committee report is available.

Constitutional Authority: No committee report is available.

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