

**STATEMENT OF  
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**FOR THE  
COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE**

**CONCERNING  
REPORTERS' PRIVILEGE LEGISLATION: ISSUES AND IMPLICATIONS  
S. 340 AND H.R. 581, THE FREE FLOW OF INFORMATION ACT OF 2005**

**JULY 20, 2005**

Introduction

This statement will focus on S. 340, the "Free Flow of Information Act of 2005." An identical bill has been introduced in the House of Representatives as H.R. 581. S. 340 would establish a Federal shield law that would preclude the Federal government from issuing compulsory process to obtain information about sources from members of the news media. It would shift from the Department of Justice to the courts the authority to evaluate requests for subpoenas to members of the media and make final decisions during criminal investigations and prosecutions as to whether subpoenas should be issued. It would create a bar against any subpoena issued to certain third parties that reasonably could be expected to lead to the discovery of the identity of a source. It would apply to all forms of Federal compulsory process, including court orders and national security letters used in terrorism and espionage investigations, to selected categories of news and informational outlets. The bill would create serious impediments to the Department's ability to effectively enforce the law and fight terrorism.

S. 340 would significantly impair the flexibility of the Executive branch in enforcing Federal law, both by imposing inflexible, mandatory standards in lieu of existing voluntary ones and by applying its restrictions on the use of compulsory process more broadly than existing regulations. The bill is bad public policy primarily because it would bar the Government from obtaining information about media sources – even in the most urgent of circumstances affecting the public's health or safety or national security – and would place an unreasonable burden upon the Government to justify to the court, in a public evidentiary proceeding, that it requires non-source information from the media in connection with sensitive grand jury investigations.

The Department of Justice recognizes that the media plays a critical role in our society. The freedom of the press is a hallowed American right, and in a time when news can be sent around the world almost instantaneously, it is as important as ever that the American people be kept informed of what is happening overseas, in Washington, and in their hometowns. For this reason, the Department's disciplined approach to subpoenas directed towards members of the news media carefully balances the public's interest in the free dissemination of ideas and information with the public's interest in effective law enforcement and the fair administration of justice.

For the last 33 years, the Department of Justice has authorized subpoenas to the news media only in the most serious cases. The guidelines set out in 28 C.F.R. § 50.10 require the Attorney General personally to approve all contested subpoenas directed to journalists, following a rigorous multi-layered internal review process involving various components of the Department.

S. 340 would disrupt the Department's ability to balance the competing interests involved in a decision to subpoena a member of the media and would strip the Department of its ability to obtain crucial evidence in criminal investigations and prosecutions. It would also effectively overrule the Supreme Court's decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), which held that reporters have no privilege, qualified or otherwise, to withhold information from a grand jury. *Branzburg* has been followed consistently by the federal courts of appeals, and was recently reaffirmed by the United States Court of Appeals for the District of Columbia in *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 364 (D.C. Cir.), *cert. denied*, 2005 U.S. Lexis 5190 (June 27, 2005). Indeed, the bill would give more protection to the reporter's "privilege" – which has not been recognized by the Supreme Court – than exists for other forms of privilege that are recognized, *e.g.*, the attorney-client privilege or the spousal privilege.

These results are completely unjustified and would pose a great threat to public safety. In the absence of a credible demonstration that the subpoena power is being abused by the Department in this area, such that sources have dried up, with the result that journalists are unable to do effective investigative reporting, there is no need for a legislative fix that substantially skews the carefully maintained balance against legitimate law enforcement interests. The next part of this statement will address the specific provisions of the bill.

## Section 2

Section 2 of the bill is intended to codify the requirements of 28 C.F.R. § 50.10 by preventing the Department from issuing subpoenas to members of the news media unless a court determines by clear and convincing evidence: (i) that there are reasonable grounds to believe, based upon non-media evidence, that a crime has occurred; (ii) that the testimony or document sought is essential to the

investigation or prosecution; and (iii) that the Department has unsuccessfully attempted to obtain the evidence from non-media sources. While, to some degree, subsection 2(a) is similar to the guidelines the Department follows in its governing regulation, the bill departs dramatically from the regulation's requirements, first, by requiring the Department to make its case before a court, after providing the news media an opportunity to be heard, and, second, by imposing a new "clear and convincing standard" to meet the section's requirements. In effect, this provision would require public mini-trials whenever the Department seeks relevant information in a criminal grand jury investigation or to justify a trial subpoena.

The bill would seriously jeopardize traditional notions of grand jury secrecy and unnecessarily delay the completion of criminal investigations. To meet the bill's "clear and convincing" standard, the Department frequently will have to present other evidence obtained before the grand jury. It is unclear how the Department can present such justifying evidence consistent with its secrecy obligations under Rule 6(e) of the Federal Rules of Criminal Procedure. Further, the provision would require that in order to issue to the media a trial subpoena for non-source information, such as a reporter's eyewitness testimony or video outtakes, the Department must showcase its evidence prematurely. These new burdens could significantly cripple effective law enforcement and thereby wreak havoc on the public's interest in the fair administration of justice. We note that media outlets often are happy to provide certain types of non-sensitive information to the Federal government, but are more comfortable doing so in response to a subpoena. By making it quite difficult to issue almost any type of subpoena, the bill would make it more difficult for media outlets to cooperate with the Federal government.

Subsection 2(b) is directed toward codifying 28 C.F.R. § 50.10(f)(4) by limiting compelled evidence from a member of the media to: (i) verifying published information; or (ii) describing surrounding circumstances relevant to the accuracy of published information. But the regulatory provision in subparagraph 50.10(f)(4) has been interpreted consistently to permit compulsion of additional types of evidence if it is apparent that there are no other sources to obtain the information and that the information is otherwise essential to the case. While subsection 2(b) includes language that the limitation is applicable "to the extent possible," it is manifestly unclear under what circumstances the court would allow other types of evidence to be subpoenaed. The provision certainly would substitute the judgment of the court for that of the prosecutor in determining what evidence was necessary in a criminal investigation or prosecution.

#### Section 4

Section 4 would ban compelling members of the news media to identify their sources of information. It would preclude the Department from compelling a

journalist to identify a confidential source of information from whom the journalist obtained information. More importantly, it also would prevent the compulsion of any information that reasonably could lead to the discovery of the identity of the source. These limitations are not in the Department's governing regulation and represent a significant departure from the state of Federal law.

The effect of this provision cannot be overstated. A provision that bars process that might obtain "any information that could reasonably be expected to lead to the discovery of the identity of . . . a source" might effectively end an investigation, particularly one that involved release of national security information. Moreover, even if the intent of the investigation were not to identify a source, the investigation might be barred because it may compel information that a court may find could reasonably lead to the discovery of a source's identity. This provision would create a perverse incentive for persons committing serious crimes involving public safety and national security to employ the media in the process.

Historically, in applying its governing regulation to requests involving source information, the Department has carefully balanced the public's interest in the free dissemination of ideas with the public's interest in effective law enforcement. The Department's regulation has served to limit the number of subpoenas authorized for source information to little more than a handful over its 33-year history. The authorizations granted for source information have been linked closely to significant criminal matters that directly affect the public's safety and welfare. Section 4 of the bill would preclude the Department from obtaining crucial evidence in vital cases, and would overrule settled Supreme Court precedent that protects the grand jury's ability to hear every person's evidence in pursuit of the truth.

The harm that this provision might cause is demonstrably greater than the purported benefit it may serve. It is essential to the public interest that the Department maintain the ability, in certain vitally important circumstances, to obtain information identifying a source when a paramount interest is at stake. For example, obtaining source information may be the only available means of abating a terrorist threat or locating a kidnapped child. Certainly, in the face of a paramount public safety or health concern or a national security imperative, the balance should favor disclosure of source information in the possession of the news media. For example, on September 11, 2001, the U.S. Attorney's Office for the Northern District of California requested authorization to subpoena facsimiles that were sent to a San Francisco, California television station from individuals who had predicted eight weeks earlier that September 11<sup>th</sup> would be "Armageddon." Under the bill, the Government would have been unable to obtain that information.

This provision would go far beyond any common law privilege. As the United States Court of Appeals for the District of Columbia Circuit recently held in *Miller*, there is no First Amendment privilege for journalists' confidential sources, and if a common law privilege exists, it is not absolute and must yield to the legitimate imperatives of law enforcement. Further, comparing the bill to existing state shield laws is inapt. None of the states deals with classified information in the way that the Federal government does, and no state is tasked with defending the nation as a whole or conducting international diplomacy. The bill makes no recognition of these critical Federal responsibilities, and would allow no exceptions for situations that endanger the national security or the public's health and safety.

Finally, section 4's definition of a confidential source is overly broad. Under subparagraph 4(1)(B), any individual whom the journalist subjectively claims to be a confidential source automatically would be afforded that status. This is the case although the source may have not sought confidential status with the journalist or even cared whether his or her identity was disclosed.

### Section 5

Section 5 appears to be an attempt to codify 28 C.F.R. § 50.10(g), the regulation governing requests to subpoena the telephone toll records of a member of the news media. It would add other business transaction records between a reporter and a third party, such as a telecommunications service provider, Internet service provider, or operator of an interactive computer service for a business purpose.

Taken together with section 4's prohibition against obtaining information that reasonably could lead to the identification of a source, this section largely ends the ability of law enforcement authorities to conduct *any* investigation involving third parties. For example, a ransom demand made to a kidnap victim's family home telephone could be investigated by compulsory process; a ransom demand made by an anonymous person to a media outlet could not be investigated by such compulsory process. This provision is inconsistent with common law and goes far beyond any statute in any State.

Like section 2, section 5 would require a public mini-trial every time the Department sought telephone or other communications service provider records in a grand jury investigation or criminal trial. For the reasons articulated above, section 5 is also bad public policy. While section 5 would establish an exception to the notice requirement if the court determines by clear and convincing evidence that notice "would pose a substantial threat to the integrity of a criminal investigation," there are no built-in mechanisms to protect from public disclosure the very information that the Department would be seeking to protect by resisting notice.

## Section 6

Even if the information sought has already been published or disseminated, section 6 of the bill would continue the ban on compelling source material and would continue to require court approval for other media evidence. The purpose of this provision is unclear. Moreover, reporters could use the provision to provide selective testimony; they could choose what facts to disclose in testimony, while every court would be barred from ordering the reporter to provide any information that the reporter chose not to share.

It is possible that the provision is intended to protect a reporter from disclosing source information that already has been publicly disclosed (inadvertently or otherwise) by someone else. Other well-established privileges are waived under certain circumstances when the information sought to be protected has been disclosed. We believe that the issue of waiver should be determined on a case-by-case basis.

## Section 7

The definition of a “covered person” contained in subparagraph 7(1)(A) of the bill raises several distinct concerns. Most significantly, it would extend the bill's protections well beyond its presumably intended objective, that is, providing special statutory protections for the kind of news- and information-gathering activities that are essential to freedom of the press under the First Amendment. For example, “covered persons” protected by the bill include non-media corporate affiliates, subsidiaries, or parents of any cable system or programming service, whether or not located in the United States. It would also include any supermarket, department store, or other business that periodically publishes a products catalog, sales pamphlet, or even a listing of registered customers.

Far more dangerously, it would cover criminal or terrorist organizations that also have media operations, including many foreign terrorist organizations, such as *al Qaida* (which, from its founding, maintained a media office that published a newsletter). Indeed, the inherent difficulty of appropriately defining a “covered person” in a world in which the very definition of “media” is constantly evolving, suggests yet another fundamental weakness in the bill. What could be shielded here is not so much the traditional media – which already is protected adequately by existing Justice Department guidelines – as criminal activity deliberately or fortuitously using means or facilities in the course of the offenses that would cause the perpetrators to fall within the definition of the media under the bill.

In addition, the provisions of the bill reach well beyond the Department of Justice. The bill applies broadly to any “Federal entity,” defined under the bill to

include “an entity or employee of the judicial, legislative, or executive branch of the Federal Government with the power to issue a subpoena or provide other compulsory process.” The bill also would reach beyond the guidelines in imposing its restrictions upon any requirement for a covered person to testify or produce documents “in any proceeding or *in connection with any issue arising under Federal law.*” Section 2(a). For example, although section 3 of the bill attempts to exclude from coverage “requests for . . . commercial or financial information unrelated to news gathering or news and information dissemination,” the meaning of this section is unclear and may not be sufficient to prevent the bill from empowering news companies to block legitimate antitrust investigations into their potentially anticompetitive mergers and business practices.

### Conclusion

Recent events no doubt have raised the public’s awareness of the issue of compelling evidence from journalists. There are legitimate competing interests involved in the ongoing dialogue on this issue. However, history has shown that the protections already in place, including the Department’s rigorous internal review of media subpoena requests coupled with the media’s ability to challenge compulsory process in the federal courts, are sufficient and strike the proper balance between the public’s interest in the free dissemination of ideas and information and the public’s interest in effective law enforcement and the fair administration of justice.

The Justice Department looks forward to working with the Committee on these important issues going forward.