Testimony
United States Senate Committee on the Judiciary
Reporters' Privilege Legislation: An Additional Investigation of Issues and Implications
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STATEMENT OF
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BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
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Good Morning. Chairman Specter, Ranking Member Leahy, and Members of the Committee, I am pleased to appear before you to discuss the Justice Department's concerns regarding S. 1419, the "Free Flow of Information Act of 2005."

The Department of Justice recognizes that the media play a vital role in our society. The freedom of the press is enshrined in the Bill of Rights, and its importance is demonstrated by its place as the First Amendment to the Constitution. The press plays a crucial role in keeping the American people informed of what is happening overseas, in Washington, and in their hometowns. Moreover, reporters are critical to the Department's efforts to prevent crime. Every day across the country, reporters file stories on the important work of the Department and thereby help to deter others from committing crimes in the future.

S. 1419 would limit the circumstances and manner in which compulsory process may be issued to members of the media. It would cover compulsory process issued by any Federal entity (including a subpoena issued by any Federal court); therefore, it would apply in a wide variety of litigation settings. The Department does not wish to comment at this time regarding the efficacy of such legislation in the context of private litigation in which the Department is not a party, and in which the Department of Justice guidelines would not apply. Rather, my testimony concerns the legitimate investigative ways in which this legislation could significantly interfere with the Government's own activities in an unnecessary and harmful way.

The Department of Justice understands the concerns that underlie this legislation, and we recognize the importance of striking a balance between the interests of the American

people in bringing criminals to justice and the needs of a free press. Current law and Department of Justice regulations governing the issuance of subpoenas to reporters and media organizations reflect an appropriate balance of those competing interests. Respectfully, as presently drafted, S. 1419 does not.

The Department opposes the bill as presently drafted primarily because the bill would create serious impediments to the Department's ability to effectively enforce the law, fight terrorism, and protect the national security. The Department's concerns center on five main aspects of the bill.

First, the bill imposes inflexible, mandatory standards in lieu of existing voluntary guidelines that can be adapted to changing circumstances. The events of the past four years have shown that law enforcement must be more, rather than less, flexible to meet the challenges posed by international terrorist organizations and sophisticated criminal enterprises.

Second, the bill would bar the Government from obtaining information about media sources even in the most urgent of circumstances affecting the public's health or safety except in a very narrow category of cases involving "imminent and actual harm to national security." This is simply too late and too narrow. Many significant, deadly crimes have nothing to do with national security, and if the harm is actual and imminent, a subpoena for source information that is approved consistent with the proposed approach will likely be too late to be helpful.

Even in cases involving harm to the national security, the Government could obtain information about media sources only if it were necessary to prevent imminent and actual harm to the national security. If harm to the national security already had been done, the Government would not be able to obtain the information. This may make it difficult, if not impossible, to obtain vital information on how national security information was disclosed and to whom it was disclosed.

For instance, in the case of the analysis and assessment of damage to national security, where information revealed through unauthorized disclosure originated can be important in determining what has been put as risk. Not all material "leaked" in a given unauthorized disclosure may be published, but nonetheless may be shared with additional parties, further compounding the damage to national security. Damage also is not always temporally confined to a given point in time; sometimes repeated disclosures magnify the impact by serving as corroboration, especially if they come from different sources.

Third, the bill would give courts the authority to evaluate requests for subpoenas to members of the media in an on-going criminal investigation and place an unreasonable burden on the Government to explain to the court, in a public evidentiary proceeding, the reasons it requires non-source information. Such a procedure would pose serious threats to grand jury secrecy and the confidentiality of on-going criminal investigations.

Fourth, the bill would bar not only subpoenas issued to reporters for their sources but also any subpoenas issued to certain third parties that reasonably could be expected to lead to the discovery of the identity of a source. The standard is impractical and would effectively prevent law enforcement from obtaining material that has nothing to do with media sources.

Fifth, the Department objects to the broad definition of "covered person" in section 5(2) that, inter alia, encompasses foreign media and foreign news agencies (including government-owned and -operated news agencies), some of which are hostile to the United States and some of which can, and have, acted in support of foreign terrorist organizations (a reporter of the Qatarian news network Al-Jazeera was recently convicted in Spain for acting as a financial courier for Al-Qaeda). The mere fact that such foreign media entities and their reporters may operate primarily abroad does not mean that they do so exclusively, or that their involvement in activity in the United States that may warrant the use of Federal compulsory process against them is a merely hypothetical prospect. Extending special privilege and legal protections to such entities in U.S. criminal and civil law enforcement proceedings, as this bill does, is entirely unwarranted and inconsistent with the Department's law enforcement mission and the war on terrorism.

Such an expansive definition of “covered person” could unintentionally offer a safe haven for criminals. As drafted, the definition invites criminals to cloak their activities under the guise of a “covered person,” so as to avoid investigation by the Federal government. The overbroad definition of a “covered person” could be read to include any person or corporate entity whose employees or corporate subsidiaries publish a book, newspaper, or magazine; operate a radio or television broadcast station; or operate a news or wire service. Additionally, the definition arguably could include any person who sets up an Internet “blog” or any other activity to “disseminate information by print, broadcast, cable satellite[, etc.],” as set forth in the bill.

More generally, the Department does not believe that legislation is necessary because there is no evidence that the subpoena power is being abused by the Department in this context. The Department prides itself on its record of objectivity in reviewing press subpoenas, and any legislation that would impair the discretion of the Attorney General to issue press subpoenas – or to exercise any other investigative options in the exercise of the President’s constitutional powers – is unwarranted. For the last 33 years, the Department of Justice has authorized subpoenas to the news media only in a small number of cases involving serious allegations of criminal conduct. Since 1991, 3.7% of the media subpoena requests processed by the Criminal Division for Attorney General approval were for confidential source material.

The guidelines set out in the Department’s regulations strike the appropriate balance between the need for evidence in a criminal investigation and the interests of a free press. Specifically, 28 C.F.R. § 50.10 already requires 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. After "all reasonable attempts" have been made to obtain information from alternative sources and negotiations for voluntary production have failed, a prosecutor may seek permission to issue a subpoena to the media if there are "reasonable grounds to believe, based on information obtained from nonmedia sources, that a crime has occurred, and that the information sought is essential to a successful investigation--particularly with reference to directly establishing guilt or innocence." Ordinarily, this requires the prosecutor to write a detailed memorandum and obtain the approval of the United States Attorney or Assistant Attorney General responsible for the investigation. The memorandum is then reviewed by the Office of Enforcement Operations and the Assistant Attorney General in the Criminal Division, the Office of Public Affairs, the Office of the Deputy Attorney General, and, ultimately, the Attorney General. The review process is sufficiently exhaustive to deter prosecutors from even making requests that do not meet the standards articulated in the regulations. As a result, subpoenas are issued to the media only when necessary to obtain important, material evidence that cannot be reasonably obtained through other means.

It is also important to note that the bill would 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 conducting a good faith investigation. Branzburg has been followed consistently by the Federal courts of appeals, and was recently followed by the United States Court of Appeals for the District of Columbia. Indeed, the bill would create a reporter's "privilege" – which has not been recognized by the Supreme Court – and give it more protection than other privileges that have been recognized, including the attorney-client privilege and the spousal privileges.

Before I turn to the Department's concerns with specific provisions of the bill, let me summarize the position of the Department as a fundamental objection to the principle of a reporter's privilege as an exception to every citizen's duty to give testimony in a Federal criminal proceeding.

Section 2

Section 2 of the bill would require public mini-trials whenever the Department seeks relevant information in a criminal grand jury investigation or to justify a trial subpoena. That section appears to be 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. The bill, however, 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. The result will be public hearings that require the government to disclose the facts of its investigation or case long before it is prudent to do so.

Paragraph 1 of Section 2(a) would effectively prohibit the Department from expeditiously issuing a subpoena to discover the identity of a source for a press report of the most dire criminal threats to public health and safety, unless the Department had prior independent knowledge of ongoing or impending criminal activity. The crime simply would not yet have occurred, as required by the proposed statute. For example, the Department has recently investigated the distribution and administration of diluted or toxic counterfeit chemotherapy drugs. If such activity were first reported by the press, the Department would need to instantaneously identify and locate any anonymous source for that story in order to minimize the further circulation and injection of these deadly concoctions. This prohibition could effectively subject innocent patients to serious bodily harm or death. Similarly, a "first" press report based on an anonymous source involving extortion and blackmail with a threat to release toxic biologic agents into the public water supply would not lend itself to a hit or miss independent investigation. There simply is no time to develop sources independent of the press when time is of the essence if lives are to be saved.

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 weaken effective law enforcement and thereby undermine the public's interest in the fair administration of justice. We note that media outlets often are willing 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 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(a)(3) would ban compelling members of the news media to identify their sources of information except in situations where the "disclosure of the identity of a source is necessary to prevent imminent and actual harm to national security." In all other cases, 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 compelled production 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, if enacted, would represent a significant departure from the current state of Federal law.

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 into very serious Federal offenses simply because the government cannot demonstrate an "imminent and actual" harm to national security. 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 could find would 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 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. Subsection 2(a)(3) 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 preventing a murder, locating a kidnapped child, or identifying a serial arsonist. Certainly, in the face of a paramount public safety or health concern, the balance should favor disclosure of source information in the possession of the news media.

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, 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 the existing 31 State and District of Columbia shield laws, and to the 18 States with common law protection, is inapt. None of the States has the responsibility of protecting the national security of the United States and protecting information that could cause serious damage to the nation itself. And no State is tasked with responsibilities for ensuring the nation's health and safety as a whole. The bill makes no recognition of these critical Federal responsibilities, and would allow no exceptions for situations that endanger the public's health and safety where "imminent and actual" harm to national security cannot be demonstrated.

The prevention of "imminent and actual" harm standard in the bill, as the basis for disclosure of a confidential source, would be virtually impossible to prove in many meritorious matters, and its limitation to national security risks is far too narrow to reach a wide range of serious felonies. Subsection 2(a)(3) completely bars the Government from obtaining critical evidence of very serious crimes that do not involve the national security. It would, for example, clearly prevent the Government from obtaining potentially life-saving source information in a murder for hire investigation because, while it may be possible to prove that the murder was "imminent," it would be impossible to show that the murder presented "actual harm to the national security." Indeed, that requirement establishes a threshold so high that it would preclude subpoenaing source information in many cases involving leaks of classified information. Moreover, even in cases where the Government could demonstrate both imminence and actual harm to national security, the bill affords prior notice and an opportunity to be heard to the reporter, thereby requiring the government to present evidence concerning its most sensitive investigations in open court. The failure of the Department to obtain ex parte, in camera judicial review in such cases would inevitably result in the Government's decision to forgo issuing the subpoena in order to prevent the premature disclosure of its evidence.

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 compelled production 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 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 restrictions on 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 2(a)(3)'s prohibition against obtaining information that reasonably could lead to the identification of a source, in most cases, this section would largely end 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's 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. Likewise, by closing all avenues of investigation into reporters' sources, section 4 could effectively eliminate the possibility of investigating or prosecuting most leaks of classified information. This provision is inconsistent with common law and goes far beyond any statute in any State.

Like Section 2, Section 4 would require a public mini-trial every time the Department sought telephone or other records from a communications service provider in a grand jury investigation or criminal trial. For the reasons articulated above, Section 4 is also bad public policy. While Section 4 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," the Department, in making its "clear and convincing" case, easily might need to reveal the selfsame information.

Section 5

The definition of a "covered person" contained in Subsection 5(2)(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 could also be read broadly to include any supermarket, department store, or other business that periodically publishes a products catalog, sales pamphlet, or even a listing of registered customers.

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. As noted, the definition could encompass foreign media and foreign news agencies which are hostile to the United States and have acted in support of foreign terrorist organizations.

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 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). The meaning of this section is unclear and it could have wide ranging, unintended consequences.

Conclusion

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.