



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 21, 2006

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find enclosed responses to questions arising from the October 19, 2005, appearance of United States Attorney Chuck Rosenberg before the Committee concerning legislation providing for a testimonial shield for members of the press. We hope that this information is helpful.

Thank you for the opportunity to present our views. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

William E. Moschella
Assistant Attorney General

Enclosure

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

October 19, 2005
Hearing Concerning
Reporters' Privilege Legislation
Committee on the Judiciary
United States Senate

Responses of
Chuck Rosenberg
United States Attorney

Responses to Questions from Senator Kyl

1. Does S. 1419 create substantial hurdles by allowing access to media sources only if necessary to prevent "imminent and actual harm to national security?" Please explain.

Answer

S. 1419 establishes a number of substantial barriers to effective law enforcement, and the hurdle created by Section 2(a)(3) – which bars access to testimony or documents that could reveal the identity of a source of information or that includes information that could reasonably be expected to reveal the identity of a source 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” – is among the most significant. The provision’s “imminent and actual” harm standard would be virtually impossible to prove in many meritorious matters, and its limitation solely to “national security” risks is much too narrow and bars the Government from obtaining potentially life-saving source information in a wide range of serious crimes. For example, the proposed bill would clearly prevent the Government from obtaining source information in a child kidnapping investigation because, while it might be possible to prove that harm was “imminent,” it would be impossible to show that the kidnapping – while egregious – presented an “actual harm to national security.” Conversely, this standard would bar access to relevant information or testimony even if access were necessary to prevent “actual harm to national security,” merely because it could not also be established that such harm were imminent. This high standard would also preclude the Government from subpoenaing source information in many leak investigations involving classified information. Moreover, even in cases where the Government could meet this standard, S. 1419 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. Inability to obtain *ex parte* and *in camera* judicial review in such cases likely would result in the Government deciding to forgo issuing the subpoena in order to prevent premature disclosure of its evidence, thereby denying the Government access to possibly the most important information in the most important cases. Finally, the bill as a whole imposes inflexible and mandatory standards which limit law enforcement’s ability to maintain flexibility and adapt to changing circumstances, a proven necessity. The provisions of the bill are highly restrictive and exceed even the protections of recognized privileges such as the attorney-client privilege, which allows for an exception in cases of criminal or fraudulent conduct. These considerations are critical during the current wartime circumstances, when entities hostile to the

United States, or their agents, may be able to invoke the protections of the legislation as "covered persons." Such restrictive legislation is not merited, particularly because there is no evidence that the Department of Justice has abused its subpoena power to obtain source information. Indeed, only 4.9% of the media subpoena requests that have been processed by the Criminal Division since 1991 were for source information, and only 12 such subpoenas have been issued in the last 14 years.

2. S. 1419 would allow a journalist to assert immunity on behalf of a source that leaked classified information in the same manner as a journalist may assert the privilege for any other source of unclassified information. Please explain the Department of Justice's specific concerns relating to classified information.

Answer

The likelihood of harm resulting from a leak of classified information and its public disclosure by the media is far greater than the likelihood of harm resulting from the disclosure of information that is not classified. Media disclosure of classified information can compromise national security, lead to the deaths of persons who are suspected of having assisted the United States Government, cause the loss of clandestine intelligence channels and information, and prompt foreign intelligence services to end their cooperation with the United States. Moreover, to the extent that the disclosure of classified information is a Federal criminal offense, S. 1419 would shield leakers who have disclosed protected information in violation of Federal criminal law and would render meaningless the laws that Congress has enacted to protect classified information.

3. Do the Department's current regulations strike an appropriate balance between allowing the press to assist the essential role of whistleblowers and the countervailing interest of protecting national security?

Answer

The Department's regulations strike an appropriate balance between the needs of the press, including its role in bringing information to the attention of the public, and the Federal government's unique responsibility to protect national security. If anything, the current guidelines may be overly restrictive because they were drafted before the then-unforeseen exigencies of the current war on terrorism. The Federal government has an obligation, however, to thoroughly investigate a situation in which classified national security information has been unlawfully disclosed regardless of who disclosed it or their motivation. As I indicated during my testimony, the notion that all leaks are beneficial is inaccurate. Some leaks are, in and of themselves, a crime, particularly leaks involving classified material. If there are no alternative means for determining the source of an unlawful disclosure, such an investigation may, by necessity, require media source information.

The Department has an established track record of restraint in seeking source information, and there is no indication that it has abused its subpoena power. The Department's regulations have been in place for over thirty years and the Department prides itself on its record of objectivity in reviewing media subpoenas. Over the last 14 years, which is the period of time for which we have the most complete records, we have issued subpoenas to the media implicating confidential sources only 12 times, and only 4.9% of all the media subpoena requests processed by the Department's Criminal Division for Attorney General approval during that period implicated confidential source material. The Department has sought such source information only in a very narrow set of circumstances, such as when the leak itself is a crime, and the authorizations for source information have been closely linked to significant criminal matters that directly affect the public's safety and welfare. Legislation that would impair the discretion of the Attorney General to issue media subpoenas is unwarranted, as there is no evidence that the subpoena power relating to journalists is being abused by the Department.

4. Would the Department support a proposal to codify the Department's existing regulations regarding subpoenaing members of the media?

Answer

The Department would oppose a proposal to codify the Department's existing regulations regarding subpoenaing members of the media. The shifting of the application of regulations that have administratively governed the issuance of media subpoenas from the Department of Justice to the Federal courts would have serious consequences adverse to law enforcement. Moreover, the Department's current guidelines were drafted decades before the ascendancy of contemporary terrorism as a primary threat to national security. Statutory codification of the existing guidelines could deprive the Government of necessary flexibility in some critical circumstances.

The administrative application of the current standards provides a necessary level of flexibility while retaining relative uniformity. The Department's performance over the past 33 years has clearly demonstrated that the administrative application of the current standards serves the media and nation well. In contrast, shifting the application of the standards to the courts would diminish that uniformity and introduce varying interpretations of critical terms in the regulations, including terms defining the class of covered persons and the need for the information sought. For example, some circuits may interpret the current terms of the regulations more broadly than the Department of Justice to permit compulsory process – a request which the Attorney General would deny – while others might view the regulations more restrictively. Inevitably, different circuits will interpret the terms of the regulations differently, and that result is contrary to the expressed media goal of having consistent standards.

The speed of the process also would be adversely affected by codifying the Department's regulations, and thus substituting the courts for the Department of Justice in imposing those standards. In an imminent harm situation, the requirement of judicial review, perhaps involving appellate levels as well, could introduce dangerous delays. If harm is actual and imminent, a

subpoena that requires judicial approval would likely be issued too late to be helpful. It should be emphasized that the media often requests a subpoena even when it is willing to cooperate upon receipt of such process; mandating judicial review, including public mini-trials, will introduce delays that do not exist today when the media is willing to provide information.

Judicial proceedings and the involvement of other parties in those proceedings relating to such on-going criminal investigations would also endanger both the necessary confidentiality of investigations and long-respected principles of grand jury secrecy. While sensitive information is appropriately handled under the existing administrative process, which involves only Department of Justice personnel including the Attorney General, judicial proceedings may reveal investigative information prematurely and cause harm both to important criminal investigations and to innocent third parties.

In conclusion, merely enacting the existing regulations and thus shifting part of the Department's role in applying those regulations to the courts could be expected to have serious adverse consequences to the uniformity, speed, and confidentiality of the process. At a time when law enforcement authorities often need greater flexibility, speed, and confidentiality in responding to terrorist and other serious threats to the public, such action would erode their effectiveness. The Department thus opposes such an approach, and instead urges continued reliance upon a system that has worked very well.

Responses to Questions From Senator Leahy

1. As a former prosecutor, I share some of your concerns about absolute privileges. I remain undecided about the legislation that has been introduced. That said, allow me to play "devil's advocate" and ask you some questions about why you think a near-absolute privilege, like the one in the Lugar bill, is harmful to law enforcement.

a. The Federal Rules of Evidence and the Supreme Court have recognized several evidentiary privileges, including attorney-client privilege. Many states have recognized additional privileges, such as priest-penitent or doctor-patient. Is there a form of a reporter's privilege that you think would be acceptable?

Answer

The proposed legislation, S. 1419, goes well beyond the current state of the law and overrules well-established Supreme Court precedent. In 1972, the Supreme Court ruled in *Branzburg v. Hayes*, 408 U.S. 665 (1972), that reporters had no privilege, qualified or otherwise, to withhold information from a grand jury conducting a good faith investigation. With the possible exception of the Third Circuit (see *In re Grand Jury Subpoena of Janet Williams*, 963 F.2d 567 (3d Cir. 1992) (*en banc*)), the Federal Courts of Appeals have consistently adhered to the guidance of *Branzburg*, and the United States Court of Appeals for the District of Columbia recently issued an opinion reaffirming that decision. See *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005), *rehearing en banc denied*, 405 F.3d 17 (D.C. Cir. 2005).

S. 1419 not only creates a new privilege for reporters, but also gives it more protection than other privileges, such as the attorney-client and spousal privileges, that have been recognized.

State media shield laws are also inapplicable. Unlike the individual States, many of which provide some form of testimonial protection to members of the media, the Federal government has the responsibility for the national security of the United States and for protecting information that could cause serious damage to the nation itself. The bill makes no recognition of such critical and unique Federal responsibilities, as it makes no exceptions for situations that endanger the public's health and safety where prevention of "imminent and actual" harm to national security cannot be demonstrated.

The Department is opposed to S. 1419 for all of the reasons set forth in my prepared statement and in my October 19, 2005 testimony. In short, S. 1419 could significantly harm Federal law enforcement efforts, and the Department will strongly oppose any legislation that creates a reporter's privilege applicable to the Federal criminal law context. The Department prides itself on its record of objectivity in reviewing media subpoenas, and any legislation that would impair the discretion of the Attorney General to issue media subpoenas is unwarranted, as there is no evidence that the subpoena power relating to journalists is being abused by the Department.

b. One of the briefs filed in the case *Branzburg v. Hayes*, 408 U.S. 665 (1972), states, "Clearly the purpose of protecting the reporter from disclosing the identity of a news source is to enable him to obtain and publish information which would not otherwise be forthcoming." Does the Department acknowledge that confidential sources result in a greater flow of information, and the publication of stories which might otherwise never be reported? Would you agree that this is to the benefit of all Americans?

Answer

The Department does not agree that the leaking of sensitive, confidential, privileged, or classified information to the media by Government officials or employees is in the national interest. We recognize that the media play a vital role in our society. The traditional press and other equally important sources of news and information keep the American people informed, and in a time when news can be sent around the world nearly instantaneously, it is as important as ever that the American people be aware of what is happening overseas, in Washington, D.C., and in their own cities and towns. Confidential sources certainly play a role in the media's ability to keep the American people informed. That is a benefit to us all.

However, there is no basis for believing that the media's ability to utilize confidential sources is under assault by the Department of Justice. The Department rarely issues subpoenas to the media seeking information about confidential sources. In the 33 years that the Department has applied its internal guidelines to media subpoenas, the press has continued to utilize information obtained from confidential sources in its reporting. No one should view S. 1419 as a necessary measure to keep information flowing from confidential sources.

2. The Department has noted that the Attorney General guidelines have been in place and have worked well for over 30 years. Do these guidelines apply to an investigation by a Special Prosecutor? If not, does a Special Prosecutor follow any guidelines?

Answer

The Department's media subpoena guidelines apply to every member of the Department, including headquarters attorneys and the United States Attorneys' Offices. The guidelines apply to all litigation in which the Department is involved, including criminal, civil, environmental, tax, and antitrust cases, unless the demand to the media is for purely commercial or financial information that is unrelated to the news gathering function. If an attorney for the Department is assigned to a matter as a special prosecutor, whether because of recusal or otherwise, the guidelines apply to that special prosecutor.

However, there are situations in which a Federal court may appoint a special prosecutor to investigate or prosecute a matter supervised by the court. In those situations, the special prosecutor does not act as a member of the Department of Justice and the media subpoena guidelines would not apply. A special prosecutor acting on behalf of the court would, of course, be required to follow applicable law and rules as they relate to the issuance of subpoenas to members of the media.

3. It is my understanding that the Attorney General guidelines do not apply to civil cases filed in Federal court. Would the Department support any kind of privilege for reporters who are called to testify in civil cases, such as in cases alleging violations of the Privacy Act?

Answer

The Attorney General's guidelines are applicable to civil as well as criminal proceedings. See 28 C.F.R. § 50.10 ("This policy statement is * * * intended to provide protection for the news media from forms of compulsory process, *whether civil or criminal*, which might impair the news gathering function") (emphasis added); 45 Fed. Reg. 76436 (Nov. 19, 1980) (making policy "applicable to subpoenas in civil proceedings"). The guidelines do not, of course, apply to civil cases to which the Federal government itself is not a party. However, as a general matter, Federal courts have recognized a qualified common law reporter's privilege in civil cases. See, e.g., *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981). The Department does not see a need for a statutory privilege that extends beyond the current contours of the qualified common law privilege, where it exists, and the Attorney General's guidelines.

4. In response to a question during the hearing, you stated that you believe that U.S. Attorney Patrick Fitzgerald, the special prosecutor in the Valerie Plame leak case is bound by the Attorney General Guidelines because he is effectively standing in the shoes of the Attorney General. Others have stated a contradictory view – that is, that special prosecutors are not bound by the guidelines. What is the position of the Department of

Justice on this issue? Is Mr. Fitzgerald bound by the Attorney General guidelines in his investigation of the Plame leak case?

Answer

As stated in response to Senator Leahy's Question # 2 above, the Department's guidelines apply to every prosecutor who acts on behalf of the Department of Justice in a criminal investigation or prosecution. Mr. Fitzgerald and his team act on behalf of the Department of Justice in the Plame investigation, and therefore the guidelines do apply. Chief Judge Hogan of the U.S. District Court for the District of Columbia, who oversees the Plame grand jury investigation, found that the Government satisfied the guideline requirements in the Plame matter. See *In re Special Counsel Investigation*, 332 F. Supp. 2d 26, 32 (D.D.C. 2004).

5. In your testimony, you stated that since 1991, twelve subpoenas have been issued by DOJ prosecutors seeking confidential source information. How many of these cases dealt with criminal leak investigations? With national security issues?

Answer

Since 1991, the Attorney General has approved the issuance of six subpoenas involving possible confidential source information in criminal leak investigations. One of the six subpoenas also involved national security issues.

Responses to Questions from Senator Durbin

1. Would this federal shield law in any way pre-empt or conflict with state courts? If so, in what ways?

Answer

S. 1419 bars any "Federal entity" (defined 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 provide other compulsory process") from compelling certain testimony or the production of certain documents. The bill expressly governs the conduct of Federal government personnel only and does not purport to exercise supremacy to pre-empt State laws or govern State personnel. Accordingly, the provisions of the bill appear inapplicable to any State court process which does not depend upon Federal entity involvement in compelling testimony or the production of documents.

The only potential conflict between the bill and State laws would likely occur in the relatively rare event in which a matter is subject to State law but is heard in a Federal court, as is the procedure in certain State criminal prosecutions which are removed to Federal courts because the prosecution involves the alleged conduct of a Federal officer in the performance of that officer's official duties. In that scenario, S. 1419 would appear to bar Federal courts from

applying any State law-derived authority to compel certain testimony or production of documents to the extent that such action by Federal personnel, such as a Federal judge, would be barred by the terms of the bill. The bill's restrictions would apply only to that scenario to the extent that the proceeding itself or the issue in dispute arises under Federal law.

2. Unlike many of the state shield laws, the proposed federal shield law does not make any exceptions for cases of libel or defamation. Should exceptions be made in cases of libel or defamation, where disclosure of a source's identity or other compelled disclosures may be necessary to prove or disprove a claim?

Answer

The Federal government is not subject to suits for defamation. See 28 U.S.C. § 2680(h) (exempting United States from suit under Federal Tort Claims Act for any claim arising out of libel or slander). Accordingly, assuming that a statutory privilege is adopted, the Department takes no position regarding the desirability of an exception to such a privilege for defamation claims. We note, however, that cases recognizing a qualified common law privilege have indicated that the privilege should be given less weight "[w]hen the journalist is a party, and successful assertion of the privilege will effectively shield him from liability * * * ." *Zerilli*, 656 F.2d at 714.

3. Section 2(a)(3) of S. 1419, the revised proposal, seems to abrogate the balancing test set forth in section 2(a)(2)(B) of the same bill. In your reading, does section 2(a)(3) immunize reporters from ever having to reveal their sources in a civil case? Given the wording of section 2(a)(3), can a court ever be able to compel disclosure of a confidential source in a civil case brought under the Privacy Act, where the alleged harm is to the plaintiff's career and reputation? If not, does this bill in effect abrogate the rights for legal redress created under the Privacy Act?

Answer

Under proposed Section 2(a)(3), a "covered person" could not be compelled to provide testimony or documents that could reveal the identity of a source or could reasonably be expected to lead to the discovery of the identity of a source unless, *inter alia*, disclosure of the identity "is necessary to prevent imminent and actual harm to national security" and disclosure "would prevent such harm." It is possible that this standard could be satisfied in a civil proceeding instituted by the Federal government. For example, the Federal government has the authority to institute civil proceedings with respect to various threats to national security (*see, e.g.,* 18 U.S.C. § 2339B(c)), and the showing required by Section 2(a)(3) might be made in such proceedings. However, it is difficult to imagine a *private* civil suit in which disclosure of a source would be necessary to prevent imminent and actual harm to national security. The Department cannot foresee a realistic scenario in which a private plaintiff could make such a showing in a suit brought under the Privacy Act.

4. Would the ‘clear and convincing evidence’ standard found in Section 2(a)(2)(B) require a stronger evidentiary showing than is required under the current ‘*Zerilli*’ balancing test used in civil cases? *See Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981) (holding that a civil plaintiff seeking such information must show that the information is central to the case and that the plaintiff has exhausted all other reasonable sources of discovery).

Answer

Zerilli does not directly address the quantum of evidentiary proof required to overcome an assertion of privilege in a civil case. However, *Zerilli* and its progeny make clear that “the balancing of the relevant factors” is a matter for the “sound discretion of the district court.” *Lee v. Department of Justice*, 413 F.3d 53, 59 (D.C. Cir. 2005); *Zerilli*, 656 F.2d at 710 (motion to compel discovery “is committed to the discretion of the district court”). The use of a “clear and convincing evidence” standard could be viewed as limiting the discretion that a district court would otherwise enjoy in balancing the relevant factors under *Zerilli*.

5. Unlike the balancing test set forth in *Zerilli*, Section 2(a)(1) of the proposed legislation requires that the ‘party seeking to compel production’ has attempted to obtain the information from ‘all persons’ from whom such information could ‘reasonably be obtained other than a covered person.’ How would the party seeking disclosure show that it has attempted to obtain the information from ‘all persons?’

Answer

Under *Zerilli*, the plaintiff in a civil action must exhaust “every reasonable alternative source of information,” 656 F.2d at 713, but “litigants [need not] be made to carry wide-ranging and onerous discovery burdens where the path [to potential alternative sources of information] is * * * ill-lighted.” *Lee*, 413 F.3d at 61 (quoting *Carey v. Hume*, 492 F.2d 631, 639 (D.C. Cir. 1974)). Section 2(a)(1) appears to require more extensive and burdensome efforts by the Government to identify and exhaust possible alternative sources of information. Under the standard set forth in Section 2(a)(1), a litigant presumably would have to identify the class of persons who could be expected to have potential knowledge of the information in question. Having done so, the litigant presumably would then have to show either that: (1) he has sought the information, without success, from all members of the class; or (2) to the extent that he has not sought the information from all members of the class, the information could not “reasonably be obtained” because of the size of the class, the inability to identify all of its members, or for some other reason.