

## S. 1419/ H.R. 3233 - "Free Flow of Information Act"

In the past year, more than two dozen reporters have been subpoenaed or questioned about their confidential sources in cases before federal courts. The cases include the BALCO grand jury investigation, the Wen Ho Lee and the Steven Hatfill privacy lawsuits, and the Valerie Plame leak investigation. One reporter has served four months in home confinement for contempt of court for not revealing a source, another reporter sits in an Alexandria, VA jail cell, and four others could face up to 18-month prison sentences by the end of the year.

Compelling reporters to testify, and, in particular, to reveal the identity of a confidential source, will restrict the flow of information to the public. An informed citizenry is crucial to democracy and helps keep our government accountable. To protect these interests, Senators Lugar (R-IN) and Dodd (D-CT) introduced S. 1419, formerly S. 340, the "Free Flow of Information Act," in the Senate. Representatives Pence (R-IN) and Boucher (D-VA) introduced H.R. 3233, formerly H.R. 581, which is identical legislation in the House.

S. 1419 and H.R. 3233 is modeled in large measure on voluntary Department of Justice guidelines, which have been in place for more than 30 years. These internal guidelines set out when the Department of Justice may subpoena reporters regarding their confidential sources. These voluntary guidelines, however, do not apply to special prosecutors or civil cases in Federal court, which is the main reason for this national, disturbing increase in reporters being subpoenaed and questioned about confidential sources.

The legislation is not an "absolute protection" for reporters to withhold information on sources. The legislation will:

- Allow testimony to be compelled from a journalist in civil and criminal cases only when there is clear and convincing evidence that (1) the party seeking the evidence has exhausted non-media sources and (2) the testimony sought is essential to the investigation or case.
- Expand upon the DOJ guidelines to include protection of the identities of confidential sources and prohibit disclosure of information that would lead to the discovery of the identity of such sources, including information from third parties. However, disclosure of the identity of the source is permitted if the disclosure is necessary to prevent "imminent and actual harm" to national security; and
- Define the scope of persons covered by these standards.

In all, 31 States and the District of Columbia have such "shield" laws in force in State courts, and 18 other States have recognized a reporter's privilege as a result of judicial decisions. In Federal courts, in contrast, there is no uniform set of standards to govern when testimony can be sought from reporters. As 34 State attorneys general recently pointed out to the Supreme Court, the lack of a clear standard of Federal protection undermines State laws.

S. 1419 and H.R. 3233 strike the proper balance between the public's interest in the free dissemination of information and the public's interest in effective and fair law enforcement. By passing the Free Flow of Information, Congress will establish important ground rules for confidential sources and reporters seeking to bring forward evidence of waste, fraud and abuse in government and in the private sector to the public.