

STATEMENTS ON INTRODUCED BILLS

S. 1267. A bill to maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media; to the Committee on the Judiciary.

Sen. Richard Lugar: Mr. President, I am pleased to rise today with my colleagues Senators Dodd, Graham, Domenici, and Landrieu to introduce the Free Flow of Information Act.

The free flow of information is an essential element of democracy. A free press promotes an open marketplace of information and provides public and private sector accountability to our Nation's electorate. By ensuring the free flow of information, citizens can work to bring about improvements in our governance and in our civic life. It is in our nation's best interest to have an independent press that is free to question, challenge, and investigate issues and stories, without concern for political party, position or who holds power. The role of the media as a conduit between government and the citizens it serves must not be devalued.

This principle that we practice at home is also one that we promote abroad. Spreading democracy abroad has become a pillar of United States foreign policy, and we have recognized that a free and independent press is both essential to building democracies and a barometer of the health of young and often imperfect democratic systems. The example of press freedom we set in this country is an important beacon to guide other nations as they make the transition from autocratic forms of government.

Unfortunately, the free flow of information to citizens of the United States is inhibited and our open market of information is being threatened. While gathering information on a story, a journalist is sometimes required to accept information under a promise of confidentiality. Without assurance of anonymity, many conscientious citizens with evidence of wrongdoing would stay silent. Restricting the manner in which appropriate news is gathered is tantamount to restricting the information that the public has the right to hear.

After a long period when there were few clashes between the media and authorities, a disturbing new trend has developed. More than 30 reporters have recently been served subpoenas or questioned in at least four different Federal jurisdictions about their confidential sources. From 1991 to September 6, 2001, the Department of Justice issued 88 subpoenas to the media, 17 of which sought information leading to the identification of confidential sources. In fact, three journalists have been imprisoned at the request of the Department of Justice, U.S. attorneys under its supervision, or special prosecutors since 2000. As a result, the press is hobbled in performing the public service of reporting news. I fear the end result of such actions is that many whistleblowers will refuse to come forward and reporters will be unable to provide the American people with information they deserve.

Most jurisdictions in our country have recognized that confidential sources are integral to the press's role of keeping the public informed, and have provided some kind of shield so that journalists can keep secret the names of such sources. Every State and the District of Columbia, excluding Wyoming, has, by legislation or court ruling, created a privilege for reporters not to reveal their confidential sources. My own State of Indiana provides qualified reporters appropriate protection from having to reveal any such information in court.

The Federal courts of appeals, however, have an inconsistent view of this matter. Some circuits allow the privilege in one category of cases, while others have expressed skepticism about whether any privilege exists at all. It does not make sense to have a Federal system of various degrees of press freedom dependent upon where you live or who provides the subpoena. In fact, 34 State attorneys general have argued that the lack of a clear standard of Federal protection undermines state laws.

In addition, there is ambiguity between official Department of Justice rules and unofficial criteria used to secure media subpoenas. The Department of Justice guidelines also do not apply to special prosecutors or private civil litigants. There is an urgent need for Congress to state clear and concise policy guidance.

In response to this situation, 2 years ago, I was pleased to join with my colleague Congressman Mike Pence, and Congressman Rick Boucher in the House of Representatives and Senator Chris Dodd in the Senate to introduce the Free Flow of Information Act. This legislation provides journalists with certain rights and abilities to seek sources and report appropriate information without fear of intimidation or imprisonment. The bill sets national standards which must be met before a Federal entity may issue a subpoena to a member of the news media in any Federal criminal or civil case. It sets out certain tests that civil litigants or prosecutors must meet before they can force a journalist to turn over information. Litigants or prosecutors must show, for instance, that they have tried, unsuccessfully, to get the information in other ways and that the information is critical to the case. These standards were based on Justice Department guidelines and common law standards.

Subsequently, additional protections have been added to this bill to ensure that information will be disclosed in cases where the information is critical to prevent death or bodily harm or in cases which relate to the unlawful disclosure of trade secrets. The bill also permits a reporter to be compelled to reveal the source in certain national security situations. Finally, the bill would provide protections to ensure that source information can be provided when personal health records and financial records were disclosed in violation of Federal law.

By providing the courts with a framework for compelled disclosure, our legislation promotes greater transparency of government, maintains the ability of the courts to operate effectively, and protects whistleblowers who identify government or corporate misdeeds.

It is also important to note what this legislation does not do. The legislation neither gives reporters a license to break the law, nor permits reporters to interfere with criminal investigation efforts. State shield laws have been on the books for years, and I have not seen any evidence to support a correlation between reporter privilege laws and criminal activity or threats to public safety. Furthermore, the Free Flow of Information Act does not weaken our national security. The explicit national security exception will ensure that reporters are protected while maintaining an avenue for prosecution and disclosure when considering the defense of our country. This qualified privilege has been carefully crafted to balance the distinct and important roles of both the press and law enforcement.

As ranking member of the United States Senate Foreign Relations Committee, I believe that passage of this bill would have positive diplomatic consequences. This legislation not only confirms America's Constitutional commitment to press freedom, it also advances President Bush's American foreign policy initiatives to promote and protect democracy. Our Nation always leads best when it leads by example.

Unfortunately, the press remains under siege in a number of foreign countries. For instance, Reporters Without Borders points out that 125 journalists are currently in jail around the world, with more than half of these cases in China, Cuba, and Burma. This is not good company for the United States of America. Global public opinion is always on the lookout to advertise perceived American double standards.

I would like to thank my colleague, Senator Chris Dodd as well as Mike Pence and Rick Boucher, in the House of Representatives for their tireless work on this issue. I look forward to continuing work with each of them to protect the free flow of information.

Sen. Christopher Dodd: Mr. President, I rise to join my colleague Senator Lugar, along with Representatives Boucher and Pence in the House of Representatives, in introducing the Free Flow of Information Act. This bill would protect journalists from being forced to reveal their confidential sources, not as an end in itself, but as a means to a well-informed public. I applaud the tireless efforts of the senior Senator from Indiana, Mr. Lugar, in once again bringing this important issue to the attention of Congress and indeed the nation.

I hardly have to read the litany of grave wrongs that have been exposed because journalists called the powerful to account. And I don't have to remind you how many of those exposures relied on confidential sources. Without confidential sources, would we still be ignorant about abuse of power in the Watergate era? Without confidential sources, would Enron still be profiting from fraud? How long would torture at Abu Ghraib have persisted, if proof hadn't been provided to the press?

The free flow of information provides the American people its most meaningful check on abuses such as those. Thomas Jefferson said it best: "If I had to make a choice, to choose the government without the press or to have the press but without the government, I will select the latter without hesitation." Jefferson clearly understood that a free Government cannot possibly last without a free press.

But today, we find this cornerstone of self-government facing a new threat. This threat has not come from the dictates of a dangerous government, but from the best of intentions. In a spate of recent cases, prosecutors have used subpoenas, fines, and jail time to compel journalists to reveal their anonymous sources. Judith Miller of The New York Times was jailed for 85 days for refusing to reveal a source. Two San Francisco Chronicle reporters were found in contempt of court for refusing to identify sources and hand over material related to the BALCO steroids investigation. A Rhode Island journalist was sentenced to home arrest on similar charges. Last year alone, a total of some two dozen reporters have been subpoenaed or questioned about confidential sources. They were all journalists prosecuted only for the offense of journalism.

The impact of these subpoenas on the broader issue of freedom of information is undeniable. Last summer, for instance, the editor-in-chief of Time magazine testified before the Senate Judiciary Committee. This is what he said about the fallout from the Justice Department's efforts to obtain confidential information from a Time reporter: "Valuable sources have insisted that they no longer trusted the magazine and that they would no longer cooperate on stories. The chilling effect is obvious."

The chilling effect is obvious. Experience has shown us that the most effective constraint on free speech need not be blatant censorship: A few cases like Ms. Miller's and the San Francisco Chronicle's, and news will begin censoring itself. We can only speculate as to how many editors and publishers put the brakes on a story for fear that it could land one of their reporters in a spider web of subpoenas, charges of contempt, and prison. When we minimize the impact of confidential sources, serious journalism is crippled. We will find our papers full of stories more and more palatable to the powerful and secretive. No one argues that that is the intention of those prosecuting these cases; but few deny that it could, in time, be their effect.

When journalists are hauled into court and threatened with imprisonment if they don't divulge their sources, we are entering dangerous territory for a democracy. The information we need to remain sovereign will be degraded; the public's right to know will be threatened; and I suggest to you that the liberties we hold dear will be threatened as well.

That is exactly why we need a Federal reporter shield. Forty-nine States and the District of Columbia have already recognized that need by enacting similar protection on the state level either through legislation or court decisions; the Free Flow of Information Act simply extends that widely recognized protection to the Federal courts.

The new version of this bill expands coverage in two significant ways. First, it will not only protect the information journalists obtain under the promise of confidentiality; it will also cover the "work product" of journalists as well, whether or not it was subject to that promise. And second, it no longer limits protection to mainstream reporters; the new version also shields any person "engaged in journalism." In today's expansive media environment, it would be unacceptable to deny the shield to our citizen-journalists.

Of course, the reporter shield is not absolute. The public's need to know must be weighed against other goods, and that is why the bill establishes a balancing test that takes into account "both the public interest in compelling disclosure and the public interest in gathering news and maintaining the free flow of information." Specifically, the bill will not protect anonymity when disclosure of a source would prevent imminent harm to national security, imminent death or bodily harm, or the release of personal or health related information. In other words, we are balancing our right to know with our need for security, whether physical or economic. Secrecy is as necessary in extreme circumstances as it is dangerous on the whole.

It is on the idea of balance that I would like to conclude. A prosecution, whatever its individual merits, sacrifices something higher when it turns on reporters; and so those merits must be balanced against the broader harms such a prosecution can work. If a free press inexorably creates a free government, as Jefferson suggested, then the agents of that free government, prosecutors included, owe a high debt to journalism. When prosecutors threaten journalism, they have begun to renege on that debt. So I am proud to support this valuable bill, a step toward rebalancing the pursuit of justice and the diffusion of truth.