
The Honorable Richard Lugar
United States Senator (R-IN) ,

Free Flow of Information Act Testimony

I. Introduction

Mr. Chairman, Ranking Member Leahy, and members of the Committee, I appreciate the opportunity you have given to me, and my colleagues, Senator Dodd, Congressman Pence and Congressman Boucher, to testify on the need for a federal media shield.

I believe that the free flow of information is an essential element of democracy. If the United States is to foster the spread of freedom and democracy around the world, it is incumbent that we support an open and free press to help build democracies and protect human rights. This is why both President Bush and the Congress have acted to support the development of free, fair, legally protected and sustainable media in developing countries. In fact, the National Endowment for Democracy is proceeding with implementation of this initiative.

Our Constitution makes very clear that freedom of the press should not be infringed. A cornerstone of our society is the open market of information which can be shared through ever expanding mediums. The media serves as a conduit of information between our governments and communities across the country.

Unfortunately, the free flow of information to citizens of the United States is under threat. Over two dozen reporters were served or threatened with jail sentences last year in at least four different Federal jurisdictions for refusing to reveal confidential sources. Judith Miller sits in jail today because she refused to release the name of her source or sources for a story she did not write. Matt Cooper, who will share his story today, was likewise threatened with imprisonment but is not in jail because of a release from his obligation to his confidential source. It is important that we ensure reporters certain rights and abilities to seek sources and report appropriate information without fear of intimidation or imprisonment. Compelling reporters to testify and, in particular, forcing them to reveal the identity of their confidential sources without extraordinary circumstances, hurts the public interest. The result will be that many whistleblowers will refuse to come forward and reporters will be unable to provide our constituents with information they have a right to know.

The legislation that Senator Dodd and I have introduced is designed to provide the press with the ability to obtain and protect confidential sources. This bill would set national standards for subpoenas issued to reporters by an entity or employee of the federal government. I believe that it strikes a reasonable balance between the public's right to know and the fair administration of justice.

II. How the law has evolved

In 1972, the Supreme Court held in *Branzburg v. Hayes*, 408 U.S. 665 (1972), that reporters did not have an absolute privilege as third party witnesses to protect their sources from prosecutors. The majority's opinion focused itself, as the Department of Justice and its supporters do today, on reporters who witnessed or provided cover for persons engaged in criminal activities. The court claimed that any damage to reporters was indirect, theoretical, uncertain and tenuous.

The majority's ruling rejected the call of their dissenting colleagues for a bright line "compelling interest" standard that would have applied strict scrutiny for government actors seeking access to media sources. Instead, the majority declined to create an absolute privilege in the context of criminal proceedings, while at the same time acknowledging the existence of First Amendment protection for newsgathering. In a concurrence that established the rule of the case by adopting a balancing test for determining when government investigators could compel reporters to reveal their sources, Justice Powell emphasized the "limited nature of the Court's holding" and wrote that government is not free to annex the news media as an investigatory service. For Justice Powell, a reporter should not have to testify when "called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation." (Id. at 710).

Since *Branzburg*, states and the federal courts have pursued different courses of action with regard to extending a reporters' privilege against disclosing confidential sources. Today every state and the District of Columbia, except Wyoming, has, through either legislation or the judiciary, created a privilege for reporters not to reveal their confidential sources. My own state of Indiana has a shield law that provides an absolute protection for qualified reporters having to reveal any information in court, whether published or unpublished, across a variety of media formats.

The federal courts of appeals, however, have an incongruent view of this matter. The 11th Circuit allows the privilege to extend to civil and criminal cases. The 9th Circuit applies the privilege to civil and criminal cases but not in grand juries. The 5th Circuit holds that reporters are only permitted protection from government subpoenas when they are intended to harass the media. The 7th Circuit has yet to decide whether there is a privilege, although, in one case, it expressed skepticism of the federal courts of appeals that had concluded that *Branzburg* established a privilege.

III. Why the Law needs to evolve more

The *Branzburg* decision is relevant today as we consider the need to give the press the ability to provide information to the public.

First and foremost, Congress should take the opportunity to clarify the extraordinary differences of opinion in the federal courts of appeals and the affect it has on undermining the general policy of protection already in place among the states. Congress should accept the invitation of the *Branzburg* decision "to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned ...as experience ... may dictate." (Id. at 705).

Second, although the Department of Justice claims that its guidelines regarding the subpoenaing of reporters do not need revision, it is becoming clear that the internal guidelines for DOJ are insufficient. For example, Mark Corallo, the former Director of the Public Affairs office at the Department of Justice under John Ashcroft, said in a July 1st Wall Street Journal article that the subpoenas against Matt Cooper and Judith Miller would not have met the Department's internal guidelines. The article continued by saying that "In the U.S. Attorneys' Manual, a prosecutor can obtain a subpoena for a member of the media without prior approval of the attorney general only when the action is necessary to 'avoid the loss of life or the compromise of a security interest.' Under Mr. Ashcroft, he noted, three unofficial criteria to secure media subpoenas were added for prosecutors to get approval from the attorney general: The information being sought should be a matter of life and death, national security or imminent danger." (WSJ, July 1, 2005, A4).

While the additional criteria that former Attorney General Ashcroft required may be appropriate, this generality of language highlights the need for clear and concise policy guidance by Congress. Passage of this law is important because it would apply not just to the Department of Justice, but also to the entire Executive Branch and the Administrative agencies, as well as special prosecutors, who often do not feel obligated to abide by DOJ policies. There would be less discrepancy in the implementation of this policy across the board.

Furthermore, the Department of Justice's guidelines do not apply to civil cases in federal court. For example, many reporters are being threatened with contempt for refusing to divulge their confidential sources in private civil lawsuits. Under the proposed law, a reporter may not be compelled to disclose information in non-criminal proceedings unless the information sought is "essential to a dispositive issue of substantial importance to that matter." The law thus establishes an important limit that will help curtail private litigants' subpoenas of reporters.

Some have contended that this legislation is unnecessary because it is the grand jury system that is in need of repair. I will leave it to this Committee to examine whether any action is necessary towards ensuring that federal grand juries operate in an appropriate manner. However, this would not diminish the right of reporters to be protected from revealing confidential sources.

Finally, as Chairman of the Foreign Relations Committee, I believe that passage of this bill would have positive diplomatic consequences. For some time now, the United States has supported efforts to develop free and independent press organizations in developing countries and those building new democracies. It is no secret that these nations look to our constitutional structure and the limits it is supposed to place on government as a model for their own burgeoning press corps.

Recently, Reporters Without Borders reported that 107 journalists are currently in jail. Thirty-two (32) are in China; 21 in Cuba and 8 in Burma. That is not good company for the United States of America. Global public opinion is always on the lookout to advertise perceived American double standards. This is evident in the ironic international response we have witnessed regarding the jailing of Judith Miller. For instance, Moscow news has reported that "the Russian Interior Ministry has denounced the arrest of U.S. journalist Judith Miller. ... [saying] 'The journalist's right to keep his sources secret is part of the press freedom mechanism in a democratic society.'" ("Russia Says U.S. Journalist's Arrest Violates Press Freedom," The Moscow News, July 7, 2005) The Guardian in London wrote "The American constitution no longer protects the unfettered freedom of the press. That is the only conclusion that can be drawn from the remarkable case of the New York Times journalist Judith Miller." (Comment, "Miller's Tale," The Guardian, Friday July 8, 2005).

Passage of this bill will have tremendous implications both nationally and internationally. Not only will citizens here have the access to information that they are due, but additionally, members of other nations will have a working model to observe and learn from as they seek to accomplish similar democratic efforts.

IV. What will happen when this law is passed?

It is important to note what this legislation does not do. The legislation does not permit rule breaking. It does not give reporters a license to break the law in the name of gathering news. It does not give reporters the right to interfere with police and prosecutors who are trying to prevent crimes. The legislation does not prohibit compelling a reporter to testify.

The Free Flow of Information Act leaves laws on classified information unchanged. It simply provides journalists certain rights and abilities to seek sources and report appropriate information without fear of intimidation or imprisonment. This principle is similar to the manner in which, in the public interest, we allow psychiatrists and social workers to maintain confidences. In essence, this bill sets national standards that 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.

In the case of a confidential source, the bill permits a reporter to be compelled to reveal the source in certain national security situations. The language of this provision was developed in response to the concerns that several of our colleagues and the Department of Justice had regarding the need for an exemption in cases of national security. The result is the formulation of a three-part test that permits the revelation of a confidential source where disclosure would be “necessary to prevent imminent and actual harm to national security.”

In the case of other information, 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 other ways. They must also prove that the information would be crucial to “an issue of substantial importance” in the case. If they were seeking confidential information in a criminal case, they must show that a crime has been committed and the information being sought is essential to the investigation.

V. Conclusion

In closing, I thank the Chairman, Ranking Member, and this Committee for looking at this signal and timely issue. This legislation will offer enough protections to assure that a whistleblower’s identity would be protected if he or she were to come forward with information about corporate or government misdeeds. At the same time, it would promote greater transparency of government and judicial activity while maintaining the ability of the courts and other federal agencies to operate in an effective manner. I look forward to working with each of you to ensure that the free flow of information is unimpeded. Thank you.

**TESTIMONY OF REP. MIKE PENCE
ON FREE FLOW OF INFORMATION ACT
SENATE COMMITTEE ON THE JUDICIARY
JULY 20, 2005**

Enshrined in the First Amendment of the Constitution of the United States are these words: “Congress shall make no law...abridging the freedom of speech, or of the press.”

The Freedom of speech and the press are two of the most important rights we Americans possess under our Constitution. They form the bedrock of our democracy by ensuring the free flow of information to the public.

Although Thomas Jefferson warned that, “Our liberty cannot be guarded but by the freedom of the press, nor that limited without danger of losing it,” today these rights are under attack.

As politicians engage in a very familiar clash along the fault lines of the politics of personal destruction, a much greater scandal languishes in a quiet prison cell in suburban Washington, D.C. in the sad image of an American journalist behind bars, who’s only crime was standing up for the public’s right to know.

And Judith Miller is not alone.

In the past year, nine journalists have been given or threatened with jail sentences for refusing to reveal confidential sources and at least a dozen more have been questioned or on the receiving end of subpoenas.

Compelling reporters to testify, and in particular compelling reporters to reveal the identity of their confidential sources, intrudes on the newsgathering process and hurts the public interest. Without the assurance of confidentiality, many whistle-blowers will simply refuse to come forward, and reporters will be unable to provide the American public with information they need to make decisions as an informed electorate.

As the Reporters Committee for the Freedom of the Press observes in the First Amendment Handbook, "Apart from diverting staff and resources from newsgathering, subpoenas issued to the news media present serious First Amendment problems. The forced disclosure of sources or information threatens the constitutional right to a free press by undercutting the media's independence from government and deterring coverage of matters likely to generate subpoenas. Indeed, the U.S. Court of Appeals in Philadelphia (3rd Cir.) recognized more than 25 years ago that 'the interrelationship between newsgathering, news dissemination, and the need for a journalist to protect his or her source is too apparent to require belaboring.'"

But with all this focus on newsgathering, it is important that we state clearly; protecting a journalist's right to keep a news source confidential is not about protecting reporters, it's about protecting the public's right to know.

As a conservative who believes in limited government, I believe that the only check on government power in real time is a free and independent press.

It was in that spirit that I introduced the Free Flow of Information Act, or federal "Shield Law," with the bipartisan support of Rep. Rick Boucher (D-VA). I would also acknowledge my profound gratitude for similar action in the Senate led by Sen. Richard Lugar (R-IN), and Sen. Chris Dodd (D-CT).

Our bill would set national standards for subpoenas issued to reporters by an entity of the federal government and strikes a proper balance between the public's interest in the free dissemination of information and the public's interest in effective law enforcement and the fair administration of justice.

In 1973, the Department of Justice of the United States adopted its Policy with Regard to the Issuance of Subpoenas to Members of the News Media. The Policy, which has been in continuous operation for more than 30 years, sets standards that must be met before federal officials may issue a subpoena to a member of the news media in any federal criminal or civil case. Our bill uses the standards of the Policy as a template for a federal shield law that would apply in all federal judicial, executive and administrative proceedings (whether government cases or private cases), except where confidential sources are involved.

In the case of a confidential source, the bill originally provided that a reporter could not be compelled to reveal the source. That language has been changed to allow for a qualified privilege only. Under our revised bill, a reporter cannot be compelled to reveal a source unless the disclosure of the identity of a source is necessary to prevent imminent and actual harm to the national security.

In the case of other information, it sets out certain tests that civil litigants or prosecutors must meet before they can force a journalist to turn over information. Prosecutors must show, for instance, that they have tried unsuccessfully to get the information in other ways and that the information would be crucial to “an issue of substantial importance” in the case. If they seek confidential information in a criminal case, they would have to show that a crime had been committed and that the information being sought was essential to the investigation. These protections are enough to ensure that a whistleblower's identity would be protected when he or she comes forward with information about corporate or government misdeeds, but they would still allow the courts and other federal agencies to do their jobs.

As I mentioned, in the past several months, there have been legitimate questions raised by some offices concerning the scope of the Act in light of the national security interests of the United States. The Department of Justice also has raised issues about the breadth of certain provisions of the Act. In light of these concerns, on Monday of this week, we filed a revised version of the Free Flow of Information Act that would narrow the Act to its core purposes and increase its precision. These revisions would accomplish the following goals:

1. Eliminate the “absolute privilege” for confidential sources. The current Act provides, in its Section 4, that Federal courts cannot compel the disclosure of confidential sources from covered persons. This revision eliminates that section. Under the revised language, then, there would be no absolute protection for confidential sources. In cases of potential harm to the national security, which is the matter of most concern to many offices and the Department of Justice, a Federal court could compel disclosure of confidential sources.

The revision accomplishes this change by deleting Section 4 and adding a new provision to Section 2 that permits a Federal entity to compel the disclosure of confidential sources if (1) the general conditions for disclosure (lack of alternative sources and a high degree of relevance to the proceeding) are met; and (2) disclosure of the identity of a source is necessary to prevent imminent and actual harm to the national security. The provision also includes a balancing test requiring a finding that the harm to be addressed by disclosure outweighs the public interest in protecting the free flow of information. (This balancing test is drawn from the concurring decision of Judge Tatel in *Miller v. United States*.)

2. Narrowed scope of coverage. The Act currently provides that a covered person includes “a parent, subsidiary or affiliate of such an entity” because many news organizations publish through separate corporate forms. If a newspaper publishes through a subsidiary and a subpoena is directed to the parent company, for example, the parent company should be covered. Questions were raised, however, about publishing entities owned by large companies with many non-media holdings, such as General Electric. Although we believe that the Act's Section 3 makes it clear that such non-media parents, subsidiaries and affiliates would not be entitled to claim the protections of the Act, we have nonetheless proposed narrowing the scope of this subpart of the definition so that it applies only to “a parent, subsidiary, or affiliate of such an entity, to the extent that such parent, subsidiary or affiliate is engaged in newsgathering or the dissemination of news and information.”

3. Elimination of Congress from scope of coverage. This revision would eliminate Congress from the definition of “Federal entity.” The definition would cover all remaining Federal entities that could issue or enforce a subpoena against a covered entity (Federal courts, the executive branch or administrative agencies).

4. Deletion of “activities not constituting a waiver” section. Section 6 of the Act was meant to ensure that reporters who continue to cover a matter on which they have received a subpoena have not waived the protections available to them under Section 2 of the Act. This section had raised questions, however, because of its general phrasing. Given that it seems highly unlikely that a Federal court would find that a covered entity has, in fact, waived any rights granted under Section 2 by continued reporting on such a matter, we believe that this section can be deleted without harming any interests in protecting whistleblowers or expressive freedoms. This should narrow the scope of the Act and resolve some questions that have been raised concerning it.

5. Narrow the scope of protection of information held by third parties. The current Act provides, in its Section 5, that covered persons must have notice and an opportunity to be heard before information is sought from any third parties with whom a covered person does business. This general concept was taken from the Department of Justice’s Guidelines, which provide similar procedures for subpoenas to telephone companies for phone records of reporters. This revision of the Act would make it clear that these procedures would apply only to communications records of covered persons, much like the Guidelines, rather than all companies doing business with covered persons. In recognition of the fact that many parties now provide communications services to covered persons in addition to telephone companies, this revision includes a more modern definition of “communications service provider” drawn from the Communications Act of 1934. The revision also clarifies that it applies to third-party litigants (one of the parties in civil litigation seeking documents from a communications service provider, for example).

6. General clarifications. In addition to these substantive changes, there have been two minor clarifications proposed in the language of the Act so that it better reflects its intent. First, in Section 2 (a)(1), the revision would clarify that it is the proponent of obtaining evidence from a covered person, not the Federal court, which must attempt to obtain the information sought from non-media sources. Second, in the definition for “covered person,” this revision would clarify that electronic publishers of newspapers, magazines and periodicals would be covered.

It is important to note what the bill does not do.

It doesn’t give reporters a license to break the law in the name of gathering news. It doesn’t give them the right to interfere with police and prosecutors who are trying to prevent crimes. It leaves laws on classified information unchanged. It simply gives journalists certain rights and abilities to seek sources and report appropriate information without fear of intimidation or imprisonment, much as, in the public interest, we allow psychiatrists, clergy and social workers to maintain confidences.

It is important to note that this bill is not a radical step. Thirty-one states, including Indiana, plus the District of Columbia, already have their own “shield laws.” Eighteen other states have recognized a reporter’s privilege through judicial decisions. Most of the provisions in our bill come directly from internal Justice Department guidelines instituted more than 30 years ago during Richard M. Nixon’s presidency. Strengthened in the 1980s, the guidelines have been maintained by Republican and Democratic administrations ever since. With the alarming rise in the number of reporters being threatened with jail, it’s time to put these guidelines into law and expand Indiana’s time-tested approach to federal proceedings nationwide.

In the midst of an unfurling controversy, I recognize that passing this legislation will not be easy. But, it is my fervent hope and prayer that this Committee and this Congress will see beyond our times and develop clear national standards that will protect the newsgathering function and promote good government.

The Liberty Bell is inscribed with these ancient words, “Proclaim liberty throughout all the land unto all the inhabitants thereof.” (Leviticus 25:10)

Now is the time for Congress to proclaim liberty and reaffirm our commitment to the ideal of a free and independent press. Now is the time for the Free Flow of Information Act. Nothing less than the public’s right to

**Statement of Senator Patrick Leahy,
Ranking Member, Senate Judiciary Committee
Hearing on “Reporters’ Shield Legislation: Issues and Implications”
July 20, 2005**

I am pleased the Committee is holding this hearing today on such an important matter. While a small number of cases have garnered significant national attention, the question of whether or not to enact some form of privilege for journalists has vexed us since *Branzburg v. Hayes* was decided by the Supreme Court in 1972. Since that time, 31 states and the District of Columbia have enacted statutes granting some form of privilege to journalists. Efforts have been made from time to time to codify a reporters’ privilege in federal law, but these attempts failed, in part because supporters of the concept found it difficult to agree on how to define the scope of what it means to be a “journalist.” With bloggers now participating fully in the 24-hour news cycle, we might face similar challenges in defining terms today.

I have long been a champion of a vibrant and independent press. My interest comes honestly and early as the son of a struggling Vermont printer from Montpelier. In my many years in the Senate, I have aspired to fulfill the ideals of my father, fighting for a free press and greater transparency in government. For example, I have long championed the Freedom of Information Act, which shines a light on the workings of government and has proven to be an invaluable tool for both reporters and ordinary citizens. Earlier this year, I introduced legislation with Senator Cornyn to improve implementation of that critical legislation. Open government goes hand in hand with freedom of the press and that is why I have advocated so strongly for it.

As a former county prosecutor, I also understand that our democracy is nothing without a healthy respect for the law. The issue before us today is especially important because it requires us to carefully weigh the public interest in First Amendment press protection and the public interest in solving crime. Indeed, recent high profile cases have shown just how thorny this issue can be.

This hearing was not called to address the Valerie Plame leak case in particular, but it is impossible to imagine that the investigation will not be discussed today. I have heard from several supporters of a privilege that they recognize that the facts of the Plame case are not particularly sympathetic to the cause because they involve an alleged national security leak from the highest level of government. I hope that our discussion also delves into the many different circumstances under which a privilege might be raised, both in civil and criminal cases.

I look forward to hearing from the witnesses’ broad range of experience and expertise on all sides of the question. I also want to commend the members who have done the hard work of drafting legislation that attempts to address this problem and am eager to hear their statements.

**Statement of U.S. Senator Russ Feingold
At the Senate Judiciary Committee**

Reporters' Shield Hearing

July 20, 2005

Mr. Chairman, I want to thank you for holding this hearing. I want to welcome our witnesses, especially my friend Floyd Abrams. The last time I saw him he was arguing against the constitutionality of the McCain-Feingold bill. Fortunately, he lost that case, but he is truly a legendary First Amendment lawyer and we are honored to have him here today. I am also pleased to be back on the same side of a First Amendment debate with him, and with the rest of this panel. Thanks to all of the panelists for their excellent testimony and willingness to be here today.

Mr. Chairman, recent events have certainly made the proposed federal shield law a hot topic. The sight of reporters in handcuffs is not a pleasant thing for any of us to see. As our witnesses have noted, these scenes are becoming more and more common. Thirty-three years after the Branzburg decision, it is time for Congress to act. I have cosponsored a bill introduced by Senator Dodd, S. 369, and I will certainly have a close look at Senator Lugar's bill as well. The important thing is to end the uncertainty, and the incongruities caused by having protection for anonymous sources in 49 states and the District of Columbia, but not in federal cases.

I do not take lightly the issues raised by the Deputy Attorney General. We must certainly consider the effect that a shield law might have on investigations and prosecutions of terrorism and other serious crimes. But anonymous sources have been too important to exposing government and corporate wrongdoing to let the current situation continue. It is not a credible argument to say that because high profile anonymous sources have continued to work with reporters even without a shield law in the decades since Branzburg that that will continue indefinitely. The chilling effect that our witnesses have mentioned is a gradual lowering of the temperature, not an instant ice age. The more high profile contempt prosecutions of journalists we have, the greater the chances that potential sources will be deterred from coming forward.

Another argument made by the Deputy Attorney General with which I disagree is that congressional legislation in this area would overrule Branzburg. That is incorrect. Branzburg stands for the proposition that the protection of the identity of anonymous sources is not required under the First Amendment. But many judges ruling in these cases have invited Congress to legislate. This is an area where Congress has the power, and the responsibility, to set out the parameters under which testimony of this kind can be compelled.

A free society cannot long survive without a robust free press. I am very grateful to our witnesses for the expertise they bring to this subject and I look forward to working with them and others to design a workable and effective federal shield law. The press will certainly benefit from such a law, but more importantly, the nation will benefit.