Statement of

The Honorable Richard Lugar

United States Senator
Indiana
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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.