

Testimony of

The Honorable

September 20, 2006

Statement of Senator Patrick Leahy,

Ranking Member, Judiciary Committee

Hearing on "Reporters' Privilege Legislation:

Preserving Effective Federal Law Enforcement"

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Today is the fourth hearing this Committee has held on reporters' shield legislation and related matters. More than a dozen journalists and First Amendment experts have come before this Committee to share their views on these matters. We have also heard from a number of current and former prosecutors. Colleagues in both houses of Congress and from both parties have weighed in during this debate. A lot of hard work has gone into this important bipartisan legislation. Yet a minority of the majority of this Committee is still holding it up. I hope today that they will tell us why, and that it will be a better explanation than simply following the orders of the Bush-Cheney Administration, which opposes the bill.

Last week, this Committee was rushed by the Republican leadership into reporting an entirely partisan and deeply flawed bill that would give the Administration unprecedented power to snoop on ordinary Americans without even having to obtain a warrant after the fact. In contrast to last week's effort to gut FISA, the bill before us today would make it easier for ordinary Americans to find out what their Government is doing, by enabling reporters to continue to gather information from confidential sources without fear that keeping their promises of confidentiality will land them in jail for contempt.

While reporter shield legislation has been sitting dormant in this do-nothing Congress, with bipartisan support, the Administration has subpoenaed dozens of reporters.

In the last year, half a dozen journalists have been jailed or fined for protecting their sources. Of course, we have no idea how many potential whistleblowers and other confidential sources have

been silenced, and how many investigative journalists have failed to cover important stories, by the fear that journalists will be unable to protect their sources. And the American people may never know what important information they might have told us.

Investigative journalism is vitally important to our democracy. My father was a Vermont printer, and he taught me the importance of the First Amendment's guarantee of a free press. That guarantee is essential to democracy because it protects investigative journalism.

The Framers did not guarantee a free press to protect the kind of propaganda the Bush-Cheney Administration has repeatedly resorted to when it has paid so-called journalists to present fake news supporting its party line about its education policies, its prescription drug program, and the situation in Iraq. Nor did the Framers guarantee a free press to protect the kind of journalism that functions as a medieval court scribe in conveying without examination the daily presidential talking points. Government propagandists and court scribes do not need the protection of the First Amendment because the Government looks after its own messengers.

But investigative journalism is the essence of the First Amendment. Investigative journalism is how whistleblowers, skeptics and dissenters get out the facts that they know to the public.

And it is how the public obtains the facts that may contradict and expose the Government's official line. Investigative journalism using confidential sources blew the lid off of Watergate. More recently, investigative journalism based on confidential sources has been critical in exposing to scrutiny many of the current Administration's appalling blunders in Iraq, in New Orleans, and elsewhere. Investigative journalism has uncovered profound incompetence and financial irregularities in the Administration's Coalition Provisional Authority in Iraq; cronyism and bureaucratic infighting in its dysfunctional Department of Homeland Security; brutality and betrayals of fundamental American values at Abu Ghraib and secret prisons scattered around the world; and appalling corruption among members of Congress, for which two House Republicans have pleaded guilty.

What investigative journalism tells us is often not welcome news - think of the pictures at Abu Ghraib. But it is precisely the news that the people of a democracy need to make informed choices and hold those in power accountable. No Government - whatever its ideological hue - can be trusted to tell the people about its blunders as well as its successes. That is why I have long championed the Freedom of Information Act, which forces the Government to disclose sometimes embarrassing information, and introduced legislation with Senator Cornyn to strengthen it. And that is why the present bill is needed to protect whistleblowers and other confidential informants so that information the Government might prefer to hide can emerge.

As for the Justice Department's stated concerns about the bill, the current version of the bill amply addresses them. As a former prosecutor myself, I fully agree that criminal wrongdoing must be punished. In a democracy, the rule of law must bind all of us equally. Good intentions should not excuse overzealous private investigators from stealing Government information illegally in a way that compromises Americans' security, any more than they should not excuse overzealous Government investigators from stealing private information illegally in a way that compromises Americans' privacy. But the legislation before us strikes a reasonable balance between safeguarding our free press and ensuring our ability to solve crimes.

And by providing substantial, although not absolute, protections to confidential sources, it also furthers important law enforcement objectives by encouraging whistleblowing that can bring to light fraud and abuse that might otherwise go unreported and unprosecuted. I am once again dismayed at the inability of the Bush-Cheney Administration to appreciate the value of whistleblowers to law enforcement and to the broader public interest. Instead of welcoming the valuable information that whistleblowers can provide, the Administration has repeatedly harassed and disparaged those who have told the public the truth. Its opposition to this bill only serves to demonstrate its eagerness to threaten journalists in order to get to confidential whistleblowers, in order to keep embarrassing information hidden. This Administration's allergy to fact-based accountability is itself the strongest proof of why this bill is needed.

The Administration is also quite wrong in suggesting that there is anything novel or radical about the bill. More than 30 states have enacted statutes granting some form of privilege to journalists, and this bill builds upon their analysis and experience in balancing the competing interests at issue. It also builds on the Justice Department's own internal guidelines for issuing subpoenas to members of the news media.

There is, of course, nothing at all novel about protecting important interests of confidentiality even in the context of criminal litigation. Federal and state courts routinely honor confidentiality between doctors and patients and lawyers and clients. Communications between whistleblowers and investigative journalists that were secured by promises of confidentiality are also important, and have no less need for the promise of confidentiality to be honored.

As I have already mentioned, the bill before us is a bipartisan bill. Therefore, while I condemn the stalling of the Bush-Cheney Administration and its allies, I want to acknowledge the Senators on both sides of the aisle who have worked hard to develop the balanced, bipartisan legislation

before us. I will continue working together with them to bring this bill to a vote of the full Senate and getting it promptly signed into law, before further damage is done to investigative journalism.

It should be but one element in a series of broader efforts to push back against the efforts of the Bush-Cheney Administration to bully and threaten everyone - be they whistleblowers, journalists, members of Congress or ordinary Americans - who attempts to hold it to account. But this bill will be an important first step, if we can move a genuinely bipartisan bill forward in this Congress and get past the stalling tactics of the Administration and its allies.