

Statement of

# The Honorable Patrick Leahy

United States Senator  
Vermont  
September 27, 2007

Statement of Chairman Patrick Leahy  
Senate Judiciary Committee  
Executive Business Meeting  
September 27, 2007

I had hoped to see the Committee consider and report a bill on establishing a statutory privilege to safeguard freedom of the press last week. The matter was held over so that will be the first topic for the Committee today. We now have a bipartisan coalition -- Senator Lugar, Senator Dodd, Senator Specter, Senator Schumer, Senator Graham and myself - united to cosponsor a version of the Free Flow of Information Act.

Senator Lugar and Senator Dodd are not members of this Committee but they have been leaders in this effort and I begin by acknowledging their leadership and commitment to this issue. Last Congress, it was Senator Lugar who introduced the Free Flow of Information Act in February 2005. Senator Dodd, who has also long been an advocate in this area, reintroduced a second version of the bill in July 2005. And then in May 2006, they introduced a third version of the bill having been joined by Senators Specter, Schumer and Graham.

During the last Congress, Senator Specter worked extremely hard on this issue and held a number of hearings before this Committee as its chairman. I believe the first was in July 2005 at which Senators Lugar and Dodd were our lead off witnesses. He was right to schedule a second hearing in October, as Senators Feinstein and I had requested, in order to hear from the Department of Justice, which had decided at the last minute not to appear at the initial hearing. The third hearing was after the bill reintroduction in May 2006 and concerned, in part, revelations about FBI demands to search the files of journalist Jack Anderson shortly after his death. The fourth hearing was then held in September 2006. I noted in my statement for that hearing that after four hearings and hearing from a dozen journalists, First Amendment experts, numerous prosecutors, it was unfortunate that "a minority of the majority" was still holding up action on the bill on behalf of the Bush Administration.

Today, after years of effort, the Senate Judiciary Committee is convening to do what it was prevented from doing last year -- to consider, and I hope report out a solid, bipartisan federal privilege law. Over the past several weeks and month the six sponsors have joined together to work out the compromise bill that we consider today. It is fair. It is balanced. It is bipartisan.

This bill would create, as a matter of federal law, a qualified privilege for journalists to protect the identity of their confidential sources.

Before I turn to Senator Specter and then Senator Schumer for their opening remarks and to offer the bipartisan substitute I would like to discuss a bit of the history that has led us here. The question of whether or not to enact some form of privilege for journalists has been around at least since the Supreme Court decided *Branzburg v. Hayes* in 1972. Today, 33 States and the District of Columbia have shield laws that protect journalists from disclosing their confidential sources and many other States, including Vermont, recognize a common law reporters' privilege. Nonetheless, at least half a dozen journalists have been jailed or fined for protecting their confidential sources during the last few years. And, according to the National Newspaper Association of America, more than 40 reporters have been subpoenaed or questioned about their confidential sources, notes and work product in federal criminal and civil cases over the past several years.

Sadly, the press has become the first stop -- rather than the stop of last resort -- for our government and private litigants when it comes to seeking information. And, this trend can have a chilling effect on the press and the public's right to know. In fact, while the federal leak investigation involving former CIA agent Valerie Plame and the BALCO steroid case are perhaps the most well-known examples, these two cases do not begin to tell the full story of the difficulties and dangers posed when the press can be routinely compelled to disclose the identity of confidential sources. We simply have no idea how many other newsworthy stories have gone unreported out of fear that a reporter would be forced to reveal a source, or face jail time.

We also do not know how many potential whistleblowers, or other confidential sources, have chosen to remain silent, out of fear that a journalist could be compelled to disclose their identity.

As the son of a Vermont printer who instilled in me the importance of the First Amendment's guarantee of a free and vibrant press, I understand that investigative journalism and a vibrant First Amendment are vitally important to our American democracy. Vermont famously re-elected Matthew Lyon to Congress while he was in jail for writing what the Administration of that time thought were unflattering remarks about the President in a letter.

Just recently, investigative journalism and confidential sources have helped uncover significant government failures in Iraq and in New Orleans, as well as government neglect at the Walter Reed Medical Center.

Still, as a former prosecutor, I also understand the importance of making sure that the government can effectively investigate criminal wrongdoing, combat terrorism and preserve national security. The consensus federal shield legislation before the Committee today strikes the proper balance among these important objectives. This bill addresses the legitimate need for law enforcement to obtain information from reporters to prevent a crime or a national security threat. In addition, by providing a qualified and not an absolute privilege to withhold the identity of confidential sources, the bill also advances other important law enforcement objectives, such as encouraging whistleblowers to disclose fraud, waste and abuse that might otherwise go unreported.

This legislation is also strongly supported by more than 50 news media and journalism organizations, including the National Newspaper Association, the Coalition of Journalists for an Open Government, the Magazine Publishers of America and the National Press Club. The call for action extends to editorial pages across the country. I will submit several letters of support for this bill that I have received for the record.

I believe that the consensus Free Flow of Information Act takes important steps to ensure a free and vibrant press, so that Americans are informed about matters that affect their lives. I am pleased to cosponsor this legislation and I urge the Committee to support this bill and report it to the Senate without further delay.

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Statement of Senator Patrick Leahy  
S.J. Res. 13 -- International Emergency Management Assistance  
Memorandum of Understanding  
Executive Business Meeting - Senate Judiciary Committee  
September 27, 2007

This Joint Resolution reflects the best traditions of international cooperation between our nation and our Canadian neighbors to the North.

Formally, this Joint Resolution would grant the consent of Congress to the International Emergency Management Assistance Memorandum of Understanding, which allows emergency responders from the United States and Canada to help each other across our shared border during natural disasters and other serious emergencies. But beyond this legal formality, this agreement reflects our longstanding cooperative partnership with Canada, and how, in times of emergency or natural disaster, we respond together, as neighbors across a largely unguarded border.

When our communities need help, we must join together and come to their aid, whether or not a border is drawn between us. This agreement allows us to honor the extraordinary tradition of international cooperation and good will between our nations, and will make the citizens of both the United States and Canada more secure and safer.

We must all do our best to prepare for the most serious emergencies that can harm our communities. These crises may arise from natural or manmade disasters, from technological hazards, civil emergencies, or even terrorist events. As those who live in the Northeast know, extreme weather is not uncommon in New England, or in the eastern provinces of Canada, and we have endured catastrophic blizzards and ice storms as recently as this winter that have closed roads and highways, shut down power for extended periods, and stranded travelers and rural residents for days, or longer. Under this agreement, first responders and emergency management professionals from the United States and Canada can work together to provide the necessary assistance to secure public safety.

This compact works well for New England and the eastern Canadian provinces, and it stands as a model for emergency management planning and cooperation. It has the support of all the emergency management directors in the New England States, and the bipartisan support of eight New England Senators have joined me and Senator Snowe to cosponsor this resolution. It is a crucial element of the security and safety planning for all communities in New England and eastern Canada.

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Statement of Senator Patrick Leahy  
Chairman, Senate Judiciary Committee  
On The Consideration of S.980,  
The Online Pharmacy Consumer Protection Act of 2007  
September 27, 2007

Today, the Committee considers the Online Pharmacy Consumer Protection Act, S.980, introduced by Senators Feinstein, Sessions and Biden. We held a hearing into these matters back on May.

The Internet has enabled all Americans better access to convenient and more affordable medicine. Unfortunately, the prevalence of rogue online pharmacies has also made the Internet an increasing source for the illegal supply of controlled substances. Online drug traffickers have used evolving tactics to evade detection by law enforcement and circumvent the proper constraints of doctors and pharmacists. As a result, dangerous and addictive prescription drugs are too often only a click away.

At our hearing in May, the Committee heard the compelling testimony of Francine Haight, a mother whose teenage son died from an overdose of painkillers he purchased online from a rogue pharmacy. We also heard from Joseph Califano, the former Secretary of the Department of Health, Education and Welfare. Both strongly supported legislation to fill a gap in existing law and help protect young people from illicit drugs online.

I thank Senator Feinstein, Senator Sessions and Senator Biden, the Chair of our Crime and Drugs Subcommittee, for their hard work. I understand that Senator Feinstein will be offering an amendment in the form of a substitute which includes several recommendations I have made to improve the bill and make it more effective.

I am glad that the substitute includes my suggestion that the Drug Enforcement Administration report to Congress on recommendations to combat the online sale of controlled substances from foreign countries via the Internet and on ways that the private sector can assist in this effort. A key ingredient in diminishing the impact of rogue websites on American citizens is combating the international aspect of this problem, and strengthening the public-private sector collaboration can help provide a solution. The substitute also narrows the Sentencing Commission directive to ensure that the most dangerous prescription drugs abused online are treated more severely than less harmful prescription drugs.

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Statement of Chairman Patrick Leahy  
On U.S. Attorney Nominations  
Senate Judiciary Committee  
Executive Business Meeting  
September 27, 2007

Today, the Committee considers the nomination of James Russell Dedrick to be United States Attorney for the Eastern District of Tennessee. I thank the Senators from Tennessee for their work in connection with this nomination.

In the course of the Committee's investigation into the unprecedented mass firings of U.S. Attorneys by the President who appointed them, we uncovered an effort by officials at the White House and the Justice Department to exploit an obscure provision enacted during the Patriot Act reauthorization to do an end-run around the Senate's constitutional authority to confirm U.S. Attorneys. The result was the firing of well-performing U.S. Attorneys for not bending to the political will of political operatives at the White House.

I had hoped when the Senate voted overwhelmingly to close this loophole, passing S.214, the "Preserving United States Attorney Independence Act of 2007," by a vote of 97-0, it would send a clear message to the Administration to nominate Senate-confirmable U.S. Attorneys and begin to restore an important check on the partisan influence in law enforcement.

Regrettably, the Administration seems to have chosen to ignore that message. It has made an abysmal effort to send nominees to the Senate to replace the fired U.S. Attorneys and to fill vacancies in those districts and many others. There are now 23 districts with acting or interim U.S. Attorneys instead of Senate-confirmed U.S. Attorneys. That is over a quarter of all districts. Yet the White House has nominated only five people for these 23 spots.

When it comes to the United States Department of Justice and to the U.S. Attorneys in our home states, Senators have a say and a stake in ensuring fairness and independence in order to insulate the federal law enforcement function from untoward political influence. That is why the law and the practice has always been that these appointments require Senate confirmation. The advice and consent check on the appointment power for U.S. Attorneys is a critical function of the Senate.

Even as we closed one loophole, the Administration has been exploiting others to continue to avoid coming to the Senate. Under the guidance of an erroneous opinion of the Justice Department's Office of Legal Counsel, the Administration has been employing the Vacancies Act authority to use acting U.S. Attorneys and the power to appoint interim U.S. Attorneys sequentially. They have used this misguided approach to put somebody in place for 330 days without the advice and consent of the Senate. This approach runs afoul of congressional intent and the law.

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