

**FREE FLOW OF INFORMATION ACT OF 2007--MOTION TO PROCEED--Resumed -- (Senate - July 29, 2008)**

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Mr. REID. Mr. President, I now move to proceed to S. 2035, which is the media shield bill.

The PRESIDING OFFICER. The motion is now pending.

Mr. REID. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. LEAHY. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. LEAHY. Mr. President, I thank the distinguished Presiding Officer. I want the distinguished Presiding Officer to know the weather in our home State is much nicer today than it is here.

I support the Free Flow of Information Act, S. 2035, which the distinguished majority leader has moved to. I hope the minority will allow us to consider this important legislation.

I thank the majority leader for his willingness to bring this legislation before the Senate. I have worked with him on this matter to find an opportunity for Senate action since the Judiciary Committee reported this bill last October. I appreciate the support of the majority leader. He has offered a generous response to the bipartisan request Senator *Specter* and I made to him and the Republican leader earlier this year to proceed to this bill. In a bipartisan letter, we asked if he would proceed to the bill. He has done that. I applaud him for it.

Our bill has 20 Senate cosponsors, Members of both parties. I hope the Republican cosponsors will join us in moving to the bill and will bring along the seven or eight Republicans we will need to overcome yet another filibuster and make progress.

I have also supported and urged the Senate to proceed to the strong House-passed version of the Free Flow of Information Act, H.R. 2102. That bill passed the House of Representatives by a vote of 398 to 21--so it obviously has overwhelming bipartisan support. The House bill has more than 70 cosponsors--both Republicans and Democrats alike.

Years ago, my mother and father owned a small daily newspaper in Waterbury, VT, the Waterbury Record. As a child, I grew up hearing, at the kitchen table, that a free and vibrant press is essential to a free society. That has been demonstrated again and again over the last eight years. That is why I cosponsored the Senate version of this bill and I have worked hard to enact a meaningful reporters' shield law this year.

That is why I made sure that for the first time ever--for the first time ever--the Senate Judiciary Committee reported a media shield law to protect the public's right to know. The Judiciary Committee reported a bill sponsored by Senators *Lugar*, *Dodd*, *Specter*, *Schumer*, *Graham*, and myself with a strong bipartisan 15-to-4 vote.

I wish to commend the leadership of Senator *Lugar* and Senator *Dodd* in connection with this matter. They began this quest for fairness when it seemed an impossibility several years ago. They have worked diligently to bring us to where we are today--at the cusp of achieving a Federal shield law--if only the Senate gets the support of a handful of Republican Senators to proceed to the bill.

All of us--whether Republican, Democratic or Independent--have an interest in enacting a balanced and meaningful shield bill to ensure a free flow of information to the American people. Forty-nine States and the District of Columbia currently have codified or common law protections for confidential source information. But even with these State law protections, the press remains the first stop, rather than the stop of last resort, for our Government and private litigants when it comes to seeking information.

Time and time again--especially during the years when this Congress refused to do real oversight of the current administration--when there was waste in Government, when there were serious mistakes in

Government, even when Government was breaking the law, we found out about it first and foremost because of the press in America.

Earlier this year, Toni Locy, a professor of journalism at West Virginia University, also a former USA TODAY reporter, was held in contempt of court for refusing to divulge her confidential sources. There are scores of other reporters who have been questioned by Federal prosecutors about their sources, notes, and reports in recent years. This is a dangerous trend that can have a chilling effect on the press, but even more so, on the public's right to know. If you don't have a free press,

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then you don't have a free society. If you don't have a way for Americans to know what their Government is doing, then we will all hurt. To paraphrase Mark Twain, you should support your country all the time but question your government when it deserves it. We need a press willing and able to do that.

Enacting the Free Flow of Information Act--which carefully balances the need to protect confidential source information with the need to protect law enforcement and national security interests--would help to reverse this troubling trend and benefit all Americans. The bill creates a qualified privilege to protect journalists from being forced to reveal their confidential sources. The bill contains exceptions to the privilege for criminal conduct or national security. The legislation also requires that Federal courts weigh the need for the information with the public's interest in the free flow of information, before compelling reporters to disclose their confidential sources.

Although I strongly support the enactment of a Federal shield law, I have some reservations about possible revisions to the bill we passed out of Committee. I am pleased that language has been drafted to address my concerns about making sure that legitimate bloggers and freelance journalists are included in the definition of the persons covered by this bill.

However, I hope that any amendments to this legislation will include stronger protections for journalists and their sources with regard to matters of national security and classified information. No one would quibble with the notion that there are circumstances when the Government can and should have the right to compel information in order to keep us safe. But many newsworthy stories concerning national security, such as the exceptional reporting on the CIA's secret prisons and the warrantless--and many feel illegal--wiretapping by the National Security Agency were published with the help of confidential sources, to the great benefit of the general public and the accountability that ordinary Americans deserve from their Government.

I fear that proposals from some in this body do not go far enough to protect against Government abuse in this area or to protect the public's interest in the dissemination of newsworthy information.

Not all reporters will be as lucky as Bill Gertz of the Washington Times was when a judge recently upheld his claim in a case in a California Federal court. Even with this victory, however, the Government has responded by broadening its inquiries. To prevent further intrusions on our fundamental first amendment rights, we need some uniform standards. We need procedures to evaluate claims of privilege and protect the public's right to know. To do that, of course, the Congress must act.

In a much touted speech to the American Enterprise Institute last week, current Attorney General Mukasey, who still opposes a Federal shield law, articulated principles that argue for enacting one. Attorney General Mukasey endorsed congressional legislative action when there exists a "serious risk of inconsistent rulings and considerable uncertainty." He noted that congressional action to provide procedures in national security cases is "well within the historic role and competence of Congress." Although he was proposing action in another setting, the Attorney General's remarks likewise support congressional action to standardize and clarify the procedures governing a Federal statutory press shield law. In view of the disparate rulings and outcomes that have developed in the courts since the Supreme Court's *Branzburg* decision 36 years ago, it is now time for Congress to establish a framework for the courts to resolve press privilege assertions fairly and consistently, and we can do this while preserving our national security.

When he testified before the Senate Judiciary Committee in favor of the Federal shield law in 2005, William Safire told us that the essence of news gathering is this: If you do not have sources you trust and who trust you, then you don't have a solid story--and the public suffers for it. Well, Bill Safire is exactly right. We simply have no idea how many newsworthy stories have gone unwritten and 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 journalists could be compelled to disclose their identity.

Just recently, investigative journalism and confidential sources have helped to uncover significant Government failures in Iraq, in New Orleans, as well as Government neglect at the Walter Reed Medical Center. We wouldn't have found out how poorly the returning soldiers were being treated--people who have lost limbs or have been paralyzed or blinded in the war in Iraq--by the Veterans' Administration and the problems and events at our Government facilities. We would not have found out about that if a confidential source hadn't told a reporter.

We have seen just in the past few days news articles about politicization at the Department of

Justice. A lot of the spotlight on how politicized this administration's Justice Department has become came out of hearings we held in the Judiciary Committee. But much of what we found out about what was going on at the Justice Department came out of press reports based on confidential sources.

We learned from the press that the White House, afraid that they might find out the truth, avoided implementing the Environmental Protection Agency's recommendations on global warming by not opening the agency's e-mails. Again, we find out about that from confidential sources.

As a former prosecutor, I understand the importance of making sure that the Government can effectively investigate criminal wrongdoing, combat terrorism, and preserve national security. The Federal shield legislation we are seeking to bring before the Senate strikes a balance among these important objectives. The 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.

The opposition to this carefully crafted bill by the Department of Justice and Office of the Director of National Intelligence, ODNI, is simply misplaced. Although 49 States, the District of Columbia, and several Federal courts have recognized a reporter's privilege either by statute or common law for years, the Department of Justice and ODNI have not cited a single circumstance where the privilege caused any harm to national security or to law enforcement. In fact, the legitimate concerns about the need to effectively combat crime and protect national security have been satisfied by the bill and by amendments to this bill offered in a bipartisan fashion by Senators *Feinstein*, *Brownback*, and *Kyl*.

A free press in our country is what sets us apart from so many other nations in the world. The distinguished Presiding Officer, in his years in the House and in the Senate, can certainly point to examples where we have found out things that have been kept hidden from the Congress only because the press uncovered them. Certainly, that has been my experience in my years here in the Senate.

I also know that there is a temptation--when any administration has made a serious mistake or is trying to hide wrongdoing by their administration, the first thing they want to do is to make sure nobody in the press or the Congress or the public finds out what they have done. For every administration, it is easy to have all of their press people go out and tout the things they want us to know, the things they consider a success. None want us to hear about the embarrassments or the mistakes or, more recently, out-and-out wrongdoing. That is where you need a press willing to go in and uncover Government wrongdoing and protect the sources who help them to do so.

Do you think even with all of the hearings I and others have held we would have found out how law enforcement was manipulated and thwarted by this administration in the selection and manipulation of U.S. attorneys?

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We found out about it first and foremost by the press, and then through witness testimony in hearings, and now by the Justice Department's Inspector General who had the willingness to stand up and point to the wrongdoing of this administration. And then there was Abu Ghraib--how did we find out about that? We learned about it in the press, not because the administration was willing to say: Look at this terrible thing we have done.

So after months and months of delaying tactics and opposition by the Bush administration, the time has come to pass a Federal shield law. I thank and commend the more than 60 news media and journalism organizations including ABC News, the Associated Press, CNN, the National Newspaper Association, the Society

of Professional Journalists, and the Vermont Press Association, that worked so hard to get us to this point.

I ask unanimous consent to have a copy of a support letter from the Media Coalition Supporting the Free Flow of Information Act printed in the *Record* following my statement.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. LEAHY. Mr. President, I will just leave with this: Let's make sure the Congress--especially this Senate--takes steps, as the other body did, to make it easier for the public to know not all the things the Government wants them to know but the times when our Government has made mistakes, the times when our Government has not followed the law, the times when our Government has tried to give disinformation. We are a stronger nation if we know the truth. We are a weaker nation if our laws allow the truth to be shielded from the American people. I trust the American people. I trust the American people to question our Government. I trust the American people to be able to handle the information. I do not trust those who would try to use every barrier to keep that information from the American people.

Mr. President, I yield the floor.

Media Coalition Supporting the Free Flow of Information Act

*July 21, 2008.*

Hon. **PATRICK J. LEAHY,**

*Chairman, Committee on the Judiciary, Russell Bldg., U.S. Senate, Washington, DC.*

*Re: S. 2035--The Free Flow of Information Act.*

**DEAR CHAIRMAN LEAHY:** On behalf of the men and women across the country who work to bring the American people vital news and information, we, the undersigned media companies and organizations, thank you for your support and co-sponsorship of S. 2035, the Free Flow of Information Act. Your leadership in support of this bill has been invaluable in fighting to ensure that the American public has access to news and information about their government and the institutions that affect their daily lives. Protecting confidential sources through federal legislation has broad support on both sides of the aisle, in both chambers of Congress, and from state attorneys general across the nation.

The legislation is vitally important to the national interest, an informed citizenry, and a free and vibrant press. As you know last October, S. 2035 was favorably reported out of the Senate Judiciary Committee on a strong 15-4 bipartisan vote and is supported by the presumptive Republican and Democrat presidential nominees, Sens. John McCain and Barack Obama. A similar shield bill (H.R. 2102) passed by an overwhelming 398-21 vote.

Chairman Leahy, we appreciate your leadership and respectfully request that you do whatever you can to make sure that S. 2035 is approved by the Senate, without any further amendments that would weaken the well-reasoned protections in the bill.

Very truly yours,

ABC News, ABC Owned Television Stations, Advance Publications, Inc., A. H. Belo Corporation, Allbritton Communications Company, American Business Media, American Society of Magazine Editors, American Society of Newspaper Editors, The Associated Press, The Associated Press Managing Editors Association.

Association of Alternative Newsweeklies, Association of American Publishers, Association of Capitol Reporters and Editors, Belo Corp., Bloomberg News, CBS Corporation, Clear Channel, CNN, Coalition of Journalists for Open Government, The Copley Press, Inc.

Cox Television, Cox Newspapers, Cox Enterprises, Inc., Daily News, L.P., First Amendment Coalition of Arizona, Inc., Freedom Communications, Inc., Gannett Co., Inc., Gray Television, Hachette Filipacchi Media U.S., Inc., Hearst Corporation.

Lee Enterprises, Inc., Magazine Publishers of America, The McClatchy Company, The McGraw-Hill Companies, Media Law Resource Center, National Association of Broadcasters, National Conference of Editorial Writers, National Federation of Press Women, The National Geographic Society, National Newspaper Association.

National Press Photographers Association, National Public Radio, NBC Universal, News Corporation, Newspaper Association of America, The Newspaper Guild-CWA, Newsweek, The New York Times Company, North Jersey Media Group Inc., Online News Association.

Pennsylvania Newspaper Association, Radio-Television News Directors Association, Raycom Media, Inc., The Reporters Committee for Freedom of the Press, Reuters America LLC, E. W. Scripps, Society of Professional Journalists, Stephens Media LLC, Time Inc.

Time Warner, Tribune Company, truTV, The Walt Disney Company, The Washington Post, U.S. News & World Report, White House News Photographers Associations.

The PRESIDING OFFICER. The Senator from New Mexico is recognized.

## ENERGY

Mr. DOMENICI. Thank you, Mr. President. I rise to talk about the subject that has to do with the energy legislation that has been pending before the Senate for I think 9 1/2 days. I wish we would have had votes before this time because it is one of the most important, if not the most important, issues confronting the American people. I am going to speak about one of the amendments the majority has to offer with reference to the Energy bill.

First, I wish to say I have no doubt that both sides of the aisle--because we do know what the public is thinking, so I would think both sides do know the public has changed its mind dramatically about drilling for American oil. It wasn't too long ago that you were afraid to use the word ``drill." You had to use the word ``explore" because drilling had a bad connotation. But when the American people got around to thinking about this idea that if we had more oil available and the world knew it and it was American and we could develop it, they knew that would require drilling. No matter how sophisticated the drilling has become with these giant offshore drilling pads which, if anybody had a chance to see one, such as I have, you would see what we can do hundreds of miles underwater, without any degradation of the environment, and how men can go to work with that equipment and build these giant facilities, where people can sleep while they maintain them.

Underground, they can drill 10, 12, even 14 wells, and they all get piped into 1 pipe, and there isn't any seepage. When we had the great hurricane, they showed pictures of the pipes underground moving with the current but not breaking. That is what is going to happen under the ground off the coast--producing billions of barrels of oil and trillions of cubic feet of natural gas. It belongs to us. Eighty-five percent of our coast is now closed.

We can speak about the fact we are already producing and already leasing, but 85 percent is not leased. Whatever is being talked about, saying that leases are there and not producing--I don't have enough time today, but I am going to explain why one of the amendments the majority has that talks about producing doesn't produce anything because it is supposedly one of these amendments that talks about drilling--drill it or lose it. That is already governed by a ``drill it or lose it" condition in every lease. So nobody is out there operating with leases they are not using, because if they do, they lose them. They paid big money to get them so they can go down there and produce energy for us.

I rise to speak on the status of the debate on this bill and on an amendment the majority has put forth under the pretext of increasing our energy supply. That is what we have been talking about--increasing our energy supply. For the most part, all the amendments we have talked about wanting to offer are increasing our energy supply. The current energy crisis is derived from many factors, but the bill the majority leader has called up attempts to deal with only one of them: speculation. There is no question that speculation is not the whole problem. In fact, four of the most prominent leaders we have in matters economic and matters that pertain to securities and matters that pertain to such things as speculation have indicated the oil and gas prices are not driven by that but, rather, by supply and demand.

As I have said before, never in my 36 years in the Senate have I seen a problem so big met with a proposed solution by the majority leader that is so

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small. Speculation is adding to the severity of our energy crisis, but without question, an imbalance between supply and demand is at the root of the problems we face.