

U.S. House of Representatives, Committee on the Judiciary

Markup of H.R. 2102, the Free Flow of Information Act of 2007

Opening Statement of Rep. Mike Pence

August 1, 2007

Thank you, Mr. Chairman. Today's markup is an important step forward in the drive to enact the Free Flow of Information Act into law. I am grateful for your leadership on this issue and for your support of this bill.

As always, I am profoundly grateful to my partner in this endeavor, the gentleman from Virginia, Congressman Rick Boucher, the author of this year's version of the bill. On the committee, I also would like to thank Congressman Howard Coble for his original cosponsorship and support of the bill.

This bill has received tremendous support in the Senate, with companion legislation having been introduced by the senior senator from my home state, Dick Lugar, and Senator Chris Dodd. On both sides of the Capitol and on both sides of the aisle, there are countless dedicated and hard-working champions for the First Amendment, and I know that they all will be very pleased to see this bill move forward today.

As Colonel Robert R. McCormick, grandson of the founder of the Chicago Tribune, said, "The newspaper is an institution developed by modern civilization to present the news of the day and to furnish that check upon government which no constitution has ever been able to provide."

As a conservative who believes in limited government, I know the only check on government power in real time is a free and independent press. The Free Flow of Information Act is not about protecting reporters; it is about protecting the public's right to know.

Our Founders enshrined in the First Amendment the following words: "Congress shall make no law...abridging the freedom of speech, or of the press."

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, we are heeding those words and taking an important step toward repairing what has become a tear in the First Amendment.

Not long ago, a reporter's assurance of confidentiality was unquestionable. That assurance led to sources who provided information to reporters so that brought forward news of great consequence to the nation, such as Watergate where government corruption and misdeeds were brought to light by the dogged persistence of a free and independent press.

However, the press cannot currently make the same assurance of confidentiality to sources, and we face the real danger that there may never be another Deep Throat. In recent years, reporters such as Judith Miller have been jailed, James Taricani placed on house arrest, Mark Fainaru-Wada and Lance Williams threatened with jail. The protections provided by the Free Flow of Information Act are necessary so that members of the media can bring forward information to the American public without fear of retribution or prosecution, and so that sources will continue to come forward.

Compelling reporters to testify, and in particular, compelling them to reveal the identity of their confidential sources, is a detriment to the public interest. Without the promise of confidentiality, many important conduits of information about our government will be shut down. The dissemination of information by the media to the public on matters ranging from the operation of our government to events in our local communities is invaluable to the operation of our democracy. Without the free flow of information from sources to reporters, the public is ill-equipped to make informed decisions.

Which is not to say the press is without fault or always gets the story right, but as James Madison wrote, "To the press alone checkered as it is with abuses the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression."

As a conservative, I believe that concentrations of power *should* be subject to great scrutiny. Integrity in government is not a Democratic or Republican issue, and corruption cannot be laid at the feet of one party. When scandal hits either party, any branch of government, or any institution in our society, it wounds our nation.

The longer I serve in Congress, the more firmly I believe in the wisdom of our Founders – especially as it pertains to the First Amendment and freedom of the press. It is imperative that we preserve the transparency and integrity of American government, and the only way to do that is by preserving a free and independent press.

It is important to note that this bill is not a radical step. Thirty-two states and the District of Columbia have various statutes that protect reporters from being compelled to testify or disclose sources and information in court. Seventeen states have protections for reporters as a result of judicial decisions. The Free Flow of Information Act would set national standards similar to those that are in effect in the states.

The Free Flow of Information Act has been carefully drafted, after reviewing internal Department of Justice guidelines and state shield laws. It puts forth a qualified privilege which strikes the appropriate balance between the public's need for information and the fair administration of justice.

In most instances, a reporter will be able to use the shield provided in the bill to refrain from testifying, providing documents, or revealing a confidential source. However, the privilege is not absolute or unlimited.

Testimony or documents can be forced if all other reasonable alternative sources have been exhausted, the testimony or document sought is critical to a criminal prosecution or a civil case, and a judge determines that the public interest in compelling disclosure outweighs the public interest in gathering or disseminating news or information.

The addition of this balancing test ensures that full and fair consideration will be given to both sides in the determination of whether a reporter must testify or turn over documents.

In a situation where a reporter is being asked to reveal the identity of a confidential source, the bill provides several exceptions whereby the reporter can be compelled to reveal the source. Sources can be revealed under exceptions for national security, bodily harm or death, trade secrets, and personal health or financial information.

The manager's amendment that will be considered provides further clarification to these exceptions. Under it, compelled disclosure of a source will be permitted if necessary to prevent terrorism or significant and specified harm to national security. The manager's amendment prevents the shield privilege from being claimed by foreign powers, agents of foreign powers and foreign terrorist organizations.

This exclusion will be added to the definition of who is a "covered person" under the bill. Covered persons are those who are able to use the shield, and there has been much discussion since the hearing about who would be covered. In the manager's amendment, we will make it clear that a covered person must be engaged in journalism for financial gain or livelihood and that no terrorists will be able to qualify.

It is important to note what the bill does not do. It does not give reporters a license to break the law in the name of gathering news. It does not 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.

With such a qualified privilege, reporters will be ensured the ability to get the American people the information they need to make choices as an informed electorate. A free and independent press is the only agency in America that has complete freedom to hold government accountable.

I am pleased that today we are considering the Free Flow of Information Act, and I encourage all of my colleagues to support this bill and join me in a strong bipartisan vote to renew our commitment to the First Amendment and America's free and independent press.