

“(1) routinely require detailed reporting from index traders and swap dealers in markets under the jurisdiction of the Commission;

“(2) reclassify the types of traders for regulatory and reporting purposes to distinguish between index traders and swaps dealers; and

“(3) review the trading practices for index traders in markets under the jurisdiction of the Commission—

“(A) to ensure that index trading is not adversely impacting the price discovery process; and

“(B) to determine whether different practices or regulations should be implemented.”.

**SEC. 9. DISAGGREGATION OF INDEX FUNDS AND OTHER DATA IN ENERGY AND AGRICULTURAL MARKETS.**

Section 4 of the Commodity Exchange Act (7 U.S.C. 6) (as amended by section 8) is amended by adding at the end the following:

“(g) DISAGGREGATION OF INDEX FUNDS AND OTHER DATA IN ENERGY AND AGRICULTURAL MARKETS.—The Commission shall disaggregate and make public monthly—

“(1) the number of positions and total value of index funds and other passive, long-only positions in energy and agricultural markets; and

“(2) data on speculative positions relative to bona fide physical hedgers in those markets.”.

**SEC. 10. ADDITIONAL COMMODITY FUTURES TRADING COMMISSION EMPLOYEES FOR IMPROVED ENFORCEMENT.**

Section 2(a)(7) of the Commodity Exchange Act (7 U.S.C. 2(a)(7)) is amended by adding at the end the following:

“(D) ADDITIONAL EMPLOYEES.—As soon as practicable after the date of enactment of this subparagraph, the Commission shall appoint at least 100 full-time employees (in addition to the employees employed by the Commission as of the date of enactment of this subparagraph)—

“(i) to increase the public transparency of operations in energy futures markets;

“(ii) to improve the enforcement of this Act in those markets; and

“(iii) to carry out such other duties as are prescribed by the Commission.”.

**LEVIN PREVENT EXCESSIVE SPECULATION ACT  
BILL SUMMARY**

The Prevent Excessive Speculation Act would:

Authorize Speculation Limits for all Energy and Agricultural Commodities. Direct CFTC to impose position limits on energy and agricultural futures contracts to prevent excessive speculation and manipulation and to ensure sufficient market liquidity.

Authorize CFTC to permit exchanges to impose and enforce accountability levels that are lower than CFTC-established speculation limits.

Close London Loophole by Regulating Offshore Traders and Increasing Transparency of Offshore Trades. Prohibit a foreign exchange from operating in the United States unless it imposes comparable speculation limits and reporting requirements as apply to U.S. exchanges.

Provide CFTC with same enforcement authority over U.S. traders on foreign exchanges as it has over traders on U.S. exchanges, including authority to require traders to reduce their holdings to prevent excessive speculation or manipulation.

Require CFTC to invite non-U.S. regulators to form an international working group to develop uniform regulatory and reporting requirements to protect futures markets from excessive speculation and manipulation.

Close the Swaps Loophole and Regulate Over-the-Counter Transactions. Authorize

CFTC to impose speculation limits on OTC transactions to protect the integrity of prices in the futures markets and cash markets.

Require large OTC trades that affect futures prices to be reported to CFTC. Allow one party to a transaction to authorize the other party to file the report. Require CFTC periodic review of reporting requirements to ensure key trades are covered.

Direct CFTC to revise bona fide hedge exemption to ensure regulation of all speculators, and strengthen data analysis and transparency of swap dealer and index trading.

Clarify definition of OTC transactions to exclude spot market transactions.

Protect Both Energy and Agriculture Commodities. Cover trades in crude oil, natural gas, gasoline, heating oil, coal, propane, electricity, other petroleum products and sources of energy from fossil fuels, as well as ethanol, biofuels, emission allowances for greenhouse gases, SO<sub>2</sub>, NO<sub>x</sub>, and other air emissions.

Cover trades in agricultural commodities listed in the Commodity Exchange Act.

Strengthen CFTC Oversight. Authorize CFTC to hire 100 new personnel to oversee markets.

Direct CFTC to issue proposed rules within 90 days and final rules within 180 days.

By Mr. SPECTER (for himself,  
Mr. SCHUMER, Mr. LUGAR, and  
Mr. GRAHAM):

S. 448. A bill to maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media; to the Committee on the Judiciary.

Mr. SPECTER. Mr. President, I sought recognition to introduce the Free Flow of Information Act of 2009. I am honored to be joined in my efforts by Senators SCHUMER, LUGAR and GRAHAM, who are original cosponsors. Some 242 years ago, on January 16, 1767, Thomas Jefferson remarked in a letter to Col. Edward Carrington, “Were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.” We take our free press for granted because it is so ingrained in our history. But we need only look at free press movements in fledgling democracies to appreciate how sometimes fragile and easily chilled freedom of press truly is.

The Free Flow of Information Act protects the public interest by ensuring an informed citizenry. In the past three years the Department of Justice has provided inconsistent numbers of subpoenaed journalists to the Judiciary Committee. We know from the public record, however, that at least 19 journalists have been subpoenaed by federal and special prosecutors for confidential source information since 2001 claim. Among them are Judith Miller, Matt Cooper, Tim Russert, Lance Williams, Mark Fainaru-Wada, and Philip Shenon. We also know 4 journalists have been imprisoned at the request either of the DoJ, U.S. Attorneys, or special prosecutors since 2000. Josh Wolf, Judith Miller, Jim Taricani, Vanessa

Leggett. Collectively, these journalists have spent over 19 months imprisoned. Journalists who are not jailed for failing to comply with subpoenas still suffer the prospect of being held in contempt. Several have suffered this fate: Toni Locy, James Stewart, Walter Pincus, Jim Taricani.

In addition to the subpoenas from special prosecutors mentioned above, more than a dozen reporters have received subpoenas in civil suits, such as the Wen Ho Lee and Hatfill privacy lawsuits against the government. A preliminary report on the 2007 Media Subpoena Survey conducted by Professor Ronnell Andersen Jones at the Law College Foundation at the University of Arizona states: 761 responding news organizations reported receiving a total of 3,602 subpoenas seeking information or material relating to newsgathering activities in calendar year 2006. Of these, 335 were subpoenas arising out of proceedings that took place in a federal forum. Sixty-four percent of responding newsroom leaders believe the frequency of media subpoenas to be greater than it was five years ago. Fifty percent of the media companies believe the risk of their own organization receiving a subpoena is greater than it was five years ago, while only 5 percent believe the risk to be less.

This bipartisan legislation would establish a qualified reporters’ privilege protecting them from being compelled to identify confidential source information. The bill seeks to reconcile reporters’ need to maintain confidentiality, in order to ensure that sources will speak openly and freely with the media, with the public’s right to effective law enforcement and fair trials. The situation in the United States today is that journalists are subject to a compulsory process to disclose confidential informants—at least in Federal courts. At the State level, there are many laws providing qualified privileges for journalists. Prior versions of this bill garnered the support of numerous bipartisan cosponsors, as well as 39 media organizations, including the Washington Post, The Hearst Corporation, Time Warner, ABC Inc., CBS, CNN, The New York Times Company, and National Public Radio.

In 2005 I cosponsored two prior bills and was principle author of yet another. In the 110th Congress, I introduced S. 1035 the Free Flow of Information Act of 2007, along with Senator SCHUMER, and Senators LUGAR, GRAHAM, and DODD other senators to join as cosponsors were Senators LEAHY, JOHNSON, BOXER, KLOBUCHAR, Salazar, Obama, Clinton, Dole, MURRAY, LANDRIEU, WEBB, TESTER, LIEBERMAN, DURBIN, BAUCUS, and LAUTENBERG. On October 4, 2007, the Committee on the Judiciary favorably reported S.2035 out of committee by a 15-4 vote, which marked the first time a reporters’ privilege bill had ever passed out of the Senate Judiciary Committee.

On March 6, 2008, I, along with Senator LEAHY, sent a letter to Majority Leader REID and Minority Leader MCCONNELL asking that S. 2035 receive floor time for full Senate consideration. They answered our call. On July 30, 2008, the Senate entertained a cloture vote on the motion to proceed to the measure that failed by a vote of 51–43. Nonetheless, the bill continues to enjoy broad bipartisan support—including the pledged support of former Senator, now—President Barack Obama. I urge all of my colleagues to join me in passing the Free Flow of Information Act of 2009, its high time we stop jailing or holding in contempt reporters who, in good faith, protect their confidential sources even in the face of a government subpoena.

There has been a growing consensus that we need to establish a Federal journalists' privilege to protect the integrity of the news gathering process, a process that depends on the free flow of information between journalists and whistleblowers, as well as other confidential sources.

Under my chairmanship, the Judiciary Committee held three separate hearings on this issue at which we heard from 20 witnesses, including prominent journalists like William Safire and Judith Miller, current and former Federal prosecutors, including former Deputy Attorney General Paul McNulty, and First Amendment scholars.

These witnesses demonstrated that there are two vital, competing concerns at stake. On one hand, reporters cite the need to maintain confidentiality in order to ensure that sources will speak openly and freely with the news media. The renowned William Safire, former columnist for the New York Times, testified that “the essence of news gathering is this: if you don't have sources you trust and who trust you, then you don't have a solid story—and the public suffers for it.” Reporter Matthew Cooper of Time Magazine said this to the Judiciary Committee: “As someone who relies on confidential sources all the time, I simply could not do my job reporting stories big and small without being able to speak with officials under varying degrees of anonymity.”

On the other hand, the public has a right to effective law enforcement and fair trials. Our judicial system needs access to information in order to prosecute crime and to guarantee fair administration of the law for plaintiffs and defendants alike. As a Justice Department representative told the Committee, prosecutors need to “maintain the ability, in certain vitally important circumstances, to obtain information identifying a source when a paramount interest is at stake. For example, obtaining source information may be the only available means of preventing a murder, locating a kidnapped child, or identifying a serial arsonist.”

As Federal courts have considered these competing interests, they adopt-

ed rules that went in several different directions. Rather than a clear, uniform standard for deciding claims of journalist privilege, the Federal courts currently observe a “crazy quilt” of different judicial standards.

The confusion began 36 years ago, when the Supreme Court decided *Branzburg v. Hayes*. The Court held that the press' First Amendment right to publish information does not include a right to keep information secret from a grand jury investigating a criminal matter. The Supreme Court also held that the common law did not exempt reporters from the duty of every citizen to provide information to a grand jury.

The Court reasoned that just as newspapers and journalists are subject to the same laws and restrictions as other citizens, they are also subject to the same duty to provide information to a court as other citizens. However, Justice Powell, who joined the 5–4 majority, wrote a separate concurrence in which he explained that the Court's holding was not an invitation for the Government to harass journalists. If a journalist could show that the grand jury investigation was being conducted in bad faith, the journalist could ask the court to quash the subpoena. Justice Powell indicated that courts might assess such claims on a case-by-case basis by balancing the freedom of the press against the obligation to give testimony relevant to criminal conduct.

In attempting to apply Justice Powell's concurring opinion, Federal courts have split on the question of when a journalist is required to testify. In more than three decades since *Branzburg*, the Federal courts are split in at least three ways in their approaches to Federal criminal and civil cases.

With respect to Federal criminal cases, five circuits apply *Branzburg* so as to not allow journalists to withhold information absent governmental bad faith. Four other circuits recognize a qualified privilege, which requires courts to balance the freedom of the press against the obligation to provide testimony on a case-by-case basis. The law in the District of Columbia Circuit is unsettled.

With respect to Federal civil cases, 9 of the 12 circuits apply a balancing test when deciding whether journalists must disclose confidential sources. One circuit affords journalists no privilege in any context. Two other circuits have yet to decide whether journalists have any privilege in civil cases. Meanwhile, 49 States plus the District of Columbia have recognized some form of reporters' privilege within their own jurisdictions. Thirty-one States plus the District of Columbia have passed some form of reporter's shield statute, and 18 States have recognized a privilege at common law.

There is little wonder that there is a growing consensus concerning the need for a uniform journalists' privilege in Federal courts. This system must be simplified.

Today, we move toward resolving this problem by introducing the Free Flow of Information Act of 2009. The purpose of this bill is to guarantee the flow of information to the public through a free and active press, while protecting the public's right to effective law enforcement and individuals' rights to the fair administration of justice.

The bill provides a qualified privilege for reporters to withhold from Federal courts, prosecutors, and other Federal entities, confidential source information and documents and materials obtained or created under a promise of confidentiality. However, the bill recognizes that, in certain instances, the public's interest in law enforcement and fair trials outweighs a source's interest in remaining anonymous through the reporter's assertion of a privilege. Therefore, it allows courts to require disclosure where certain criteria are met.

Under the legislation, in most criminal investigations and prosecutions, the Federal entity seeking the reporter's source information must show that there are reasonable grounds to believe that a crime has occurred, and that the reporter's information is essential to the prosecution or defense. In criminal investigations and prosecutions of leaks of classified information, the Federal entity seeking disclosure must additionally show that the leak caused significant, clear, and articulable harm to national security. In noncriminal actions, the Federal entity seeking source information must show that the reporter's information is essential to the resolution of the matter.

In all cases and investigations, the Federal entity must demonstrate that nondisclosure would be contrary to the public interest. In other words, the court must balance the governmental need for the information against the public interest in newsgathering and the free flow of information.

Further, the bill ensures that Federal Government entities do not engage in “fishing expeditions” for a reporter's information. The information a reporter reveals must, to the extent possible, be limited to verifying published information and describing the surrounding circumstances. The information must also be narrowly tailored to avoid compelling a reporter to reveal peripheral or speculative information.

Finally, the Free Flow of Information Act adds layers of safeguards for the public. Reporters are not allowed to withhold information if a Federal court concludes that the information is needed for the defense of our Nation's security, as long as it outweighs the public interest in newsgathering and maintains the free flow of information to citizens, or to prevent an act of terrorism. Similarly, journalists may not withhold information reasonably necessary to stop a kidnapping or a crime that could lead to death or physical injury. Also, the bill ensures that both crime victims and criminal defendants

will have a fair hearing in court. Under this bill, a journalist who is an eyewitness to a crime or tort or takes part in a crime or tort may not withhold that information on grounds of the qualified privilege. Journalists should not be permitted to hide from the law by writing a story and then claiming a reporter's privilege.

It is time for Congress to clear up the ambiguities journalists and the Federal judicial system face in balancing the protections journalists need in providing confidential information to the public with the ability of the courts to conduct fair and accurate trials. I urge my colleagues to support this legislation and help create a fair and efficient means to serve journalists and the news media, prosecutors and the courts, and most importantly the public interest on both ends of the spectrum.

By Mr. SPECTER (for himself, Mr. LIEBERMAN, and Mr. SCHUMER):

S. 449. A bill to protect free speech; to the Committee on the Judiciary.

Mr. SPECTER. Mr. President, I am introducing the Free Speech Protection Act of 2009 to address a serious challenge to one of the most basic protections in our Constitution. American journalists and academics must have the freedom to investigate, write, speak, and publish about matters of public importance, limited only by the legal standards laid out in our First Amendment jurisprudence, including precedents such as *New York Times v. Sullivan*. Despite the protection for free speech under our own law, the rights of the American public, and of American journalists who share information with the public, are being threatened by the forum shopping of libel suits to foreign courts with less robust protections for free speech.

These suits are filed in, and entertained by, foreign courts, despite the fact that the challenged speech or writing is written in the United States by U.S. journalists, and is published or disseminated primarily in the United States. The plaintiff in these cases may have no particular connection to the country in which the suit is filed. Nevertheless, the U.S. journalists or publications who are named as defendants in these suits must deal with the expense, inconvenience and distress of being sued in foreign courts, even though their conduct is protected by the First Amendment.

An example of why the legislation is necessary is found in litigation involving Dr. Rachel Ehrenfeld, a U.S. citizen and Director of the American Center for Democracy, whose articles have appeared in the *Wall Street Journal*, the *National Review*, and the *Los Angeles Times*. She has been a scholar with Columbia University, the University of New York School of Law, and Johns Hopkins, and has testified before Congress. Dr. Ehrenfeld's 2003 book, *"Fundamental Evil: How Terrorism is Financed*

and How to Stop It", which was published solely in the United States by a U.S. publisher, alleged that a Saudi Arabian subject and his family financially supported Al Qaeda in the years preceding the attacks of September 11. He sued Ehrenfeld for libel in England, although only 23 books were sold there. Why? Because under English law, it is not necessary for a libel plaintiff to prove falsity or actual malice as is required in the United States.

Dr. Ehrenfeld did not appear, and the English court entered a default judgment for damages, an injunction against publication in the United Kingdom, a "declaration of falsity", and an order that she and her publisher print a correction and an apology.

Dr. Ehrenfeld sought to shield herself with a declaration from both federal and state courts that her book did not create liability under American law, but jurisdictional barriers prevented both the Federal and New York State courts from acting. Reacting to this problem, the Governor of New York, on May 1, 2008, signed into law the "Libel Terrorism Protection Act." Congress must now take similar action. I note that the person who sued Dr. Ehrenfeld has filed dozens of lawsuits in England, and there is a real danger that other American writers and researchers will be afraid to address this crucial subject of terror funding and other important matters. Other countries should be free to have their own libel law, but so too should the United States. Venues that have become magnets for defamation plaintiffs from around the world permit those who want to intimidate our journalists to succeed in doing so. The stakes are high. The United Nations in 2008 noted the importance of free speech and a free press, and the threat that libel tourism poses to the world.

Following the New York example, the legislation my co-sponsors and I introduce today confers jurisdiction on federal courts to bar enforcement of foreign libel judgments if the material at issue would not constitute libel under U.S. law. Significantly, it also deters foreign suits in the first place by permitting American defendants to countersue from the moment papers are served on them. Damages available in the countersuit include the amount at issue in the foreign libel suit as well as treble damages if the foreign suit is part of a scheme to suppress a U.S. person's first amendment rights.

This deterrent mechanism is critical because those who bring these foreign libel suits are more interested in intimidating the authors than in actually collecting damages. They know that even if a foreign judgment cannot be enforced in the United States, the cost of defending the suit and the penalty for taking a default judgment can have a chilling effect on American writers and publishers. In particular, under English law a contempt citation may issue against authors or publishers who fail to satisfy default judgments, pursuant to which their prop-

erty may be seized and they may be imprisoned. What is worse, defendants can no longer skirt the consequences merely by avoiding contact with England. Under recent European Commission regulations, default judgments for monetary claims are enforceable in all EU countries except Denmark.

The potentially severe ramifications of a default judgment make clear that merely barring enforcement of a foreign libel judgment in U.S. courts is entirely insufficient particularly for publishers with European offices. While it is important to bar enforcement, in the words of a *New York Times* editorial, that does "not go as far as it could."

I often remark that the Senate is the world's greatest deliberative body and all the facts and arguments ought to be examined before it acts. Accordingly, I must address a letter in opposition to this bill from a prominent British libel lawyer and explain why his arguments are unpersuasive.

He notes that a "U.S. citizen . . . knocked down by the negligent driving" of a London taxi driver is "just as entitled as any British citizen" to sue in England for damages. Why should a U.S. citizen "not be entitled on the same basis, like any other UK citizen, to sue for damages to his reputation?" The answer, of course, is that the analogy is inapt. In that hypothetical, the plaintiff sues the defendant in the defendant's jurisdiction for a harm committed and suffered there, an injury that is universally recognized as a tort. By contrast, the plaintiff in a foreign libel action purposely avoids suing in the jurisdiction where the defendant journalist writes and publishes, a jurisdiction where the material is not libelous. The proper analogy would be if the injured American had sued the taxi driver in the United States instead of England because the driver's conduct would not constitute negligence under English law. That hardly seems fair play. Our bill is designed specifically to prevent such forum shopping.

That essay also asks whether "legislators will extend their intervention" to commercial matters such as contracts and debts and warns that such extension could trigger "retaliatory action on the part of UK legislators." Actually, such extension has already happened, but at the hands of British legislators not American ones. In the antitrust context, British law bars enforcement of foreign judgments for treble damages such as those awarded by U.S. courts. In addition, it allows a British corporation, against whom a judgment for treble damages was entered in a foreign court, to recover from the plaintiff any excess over actual damages. In any event, this bill is confined to the narrow area of core First Amendment rights.

"Perhaps of most significance" he continues in his letter, is that to his knowledge "very few of these claims have actually come before UK courts." But it is the chilling effect and the