

MUKASEY: A shield for the press?

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The Senate is considering the "Free Flow of Information Act of 2007," which would exempt any reporter from having to reveal a confidential source of information. Advocates claim there is a compelling need for this new privilege as a bulwark against rising government intrusion that threatens the sanctity of the reporter-source relationship.

They claim the resulting impediments to law enforcement are justified. Neither claim withstands scrutiny.

The Department of Justice is committed to protecting a free and robust media, but creating a statutory privilege for journalists is no small matter. A legal privilege can bar access to information otherwise relevant to national security, criminal and civil investigations and proceedings. Technological advances constantly expand the population involved in what could be considered "journalism," and the range of information potentially subject to a journalist's privilege is virtually limitless.

Now, the determination of whether to issue a subpoena to a member of the press rests with the Department of Justice. For more than 35 years, the Department has followed rigorous guidelines that severely limit the circumstances in which subpoenas can be issued to journalists. This strict regime balances the critical role the media plays in our society with the Department's obligations to protect the nation and fairly administer justice and ensures that the media is a source of last resort in our investigations.

This bill would upset this balance by transferring from the executive branch to the judiciary the ultimate decision of whether a subpoena can be issued to the media. One might assume that a fundamental change of this kind would be considered only in response to a dramatic spike in the number of subpoenas to the press. In fact, the opposite is true. Since 1991, the Department has approved subpoenas to reporters seeking confidential source information in fewer than two dozen matters. This record provides no justification for a new statutory privilege.

In addition to being unnecessary, the Free Flow of Information Act has a potentially damaging impact on national security. The bill provides nominally for a national security exception to the privilege, but it requires proof that the information sought from a journalist would assist in preventing an act of terrorism or other "significant and articulable" harm to national security. This standard may prove to be impossible to satisfy before the harm occurs, and doing so likely would require the government to produce in open court even more highly sensitive information than was already at stake. Even if the government carried its burden, a judge could still deny access to the information if he or she determined that the threat did not "outweigh the public interest in news gathering and maintaining a free flow of information."

It is simply unacceptable to condition the government's access to information necessary to protect national security on an individual judge's subjective valuation of the "public interest."

The bill raises additional national security concerns in its treatment of the leaking of classified information. In particular, it inexplicably singles out the leaking of classified information for a higher standard than the one it imposes for the government to get media source information in other criminal cases. Leaking classified information is itself a crime, but in order for the government to get source information from a journalist in a leak investigation it must show that the leak caused significant, articulable harm to national security, that the information was properly classified, and the person who leaked it was authorized to have it.

Thus, a would-be leaker of classified information could simply give it to someone not authorized to have it, urge that person to leak it, and thereby prevent the government from investigating the crime. Here again, even if the government is able to meet this exacting standard, the bill gives a judge full discretion to block disclosure if he or she decides that doing so is in the "public interest." In the end, of course, even if ordered to disclose information, a reporter could refuse to do so, as others have under current law, and face contempt.

This statute would effectively cripple the government's ability to identify and prosecute leakers of classified information. Ironically, a bill styled as a "reporter's shield" would have the perverse effect of shielding would-be leakers, and in the process encourage more leaks that aid our enemies and threaten national security. It is therefore no surprise that members of the Intelligence Community - including the FBI, CIA and the Director of National Intelligence - have expressed strong opposition to this bill.

The Department of Justice has sought source information from the press only in extraordinary circumstances. Against this record of restraint, the Free Flow of Information Act would replace the current framework with a sweeping new privilege that poses serious risks to national security and law enforcement. The Senate should reject this unnecessary and unwise legislation.

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