

No need for a shield

Bill would put reporters above the law, cause 'grave consequences.'

By Michael B. Mukasey

What do the Pentagon Papers, Watergate and Enron have in common? Each was a major news story brought to light by sources who provided information to the news media under a promise of confidentiality. Supporters of a federal shield law for reporters often point to stories such as these as evidence of why this law is necessary — the implication being that, without it, important stories as these will go unreported.

But each of those stories, and countless others, came to light without a federal reporters' shield law.

In fact, in the 36 years since the Supreme Court ruled that reporters — like their fellow citizens — have no First Amendment privilege to resist grand jury subpoenas, we have seen an explosion of news and information available to the public on every conceivable topic, belying the notion that a federal shield law is necessary to ensure the "free flow of information" we see in newspapers, magazines and websites every day.

If passed, this law inevitably would cause significant problems. The heavy evidentiary burden the bill would impose on prosecutors seeking information from reporters will impede investigations of serious crimes, including terrorism and other threats to the national security.

This burden would be especially difficult to carry in cases involving leaks of classified information — something we can scarcely afford in a time of war, and something that will encourage leaks by virtually assuring impunity. And although the stated goal of the legislation is to address subpoenas, by its terms the impact of the bill is not so limited, and it could implicate core national security authorities.

Notably, this new legislation would do nothing to ensure that even if the public's national security interests were demonstrated, reporters would provide necessary information. There is no requirement, for example, that the disputed information be deposited with or reviewed by a court pending the resolution of the case. The media are as free as ever to litigate, lose and still refuse to comply.

Reporters serve a vitally important function in our democratic society, but they are not above the law. This legislation would change that — with grave consequences for national security and law enforcement.

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