

Despite Continued Opposition from the Bush Administration, Congress Should Protect Reporters' Confidential Sources

Bush administration officials have reiterated their opposition to the Free Flow of Information Act. The opposition overlooks the Act's numerous protections for national security and law enforcement and the pressing need to protect confidential sources who expose government wrongdoing and corruption. In the words of President Bush's former Solicitor General, Ted Olson, "This legislation is well balanced and long overdue, and should be enacted."

1. The Act protects the government's ability to remedy past harm to national security and to prevent future harm to national security.

- **Claim:** "This bill is geared toward September 10, 2001, but not to September 12, 2001."
- **In fact:** The bill provides protections for efforts to prevent future harm to national security and to remedy past harm to national security.
 - The Act requires disclosure when the information would "assist" in preventing an act of terrorism or other harm to national security.
 - The Act allows for disclosure when necessary to investigate and prosecute past acts of terrorism.
 - The Act allows for disclosure when a leak of classified information will cause or has caused harm to national security.

2. The Act protects the secrecy of classified information essential to national security.

- **Claim:** The Act "serves as a road map to leaking classified information," and "transfers to the courts such core determinations as when investigative subpoenas are necessary and what constitutes harm to national security."
- **In fact:** The Act expressly provides for disclosure from the journalist when a leak of classified information has harmed or will harm national security. Because most information is classified improperly, and thus does not implicate national security, independent judicial review is essential:
 - According to Governor Kean, Chairman of the 9/11 Commission, "Three-quarters of what I read that was classified shouldn't have been." Cox News Service, July 21, 2004.
 - Rodney P. McDaniel, Executive Secretary of the National Security Council under President Reagan, states that only 10 percent of classification was for "legitimate protection of secrets." 1997 Moynihan Commission Report, at 36.

3. The Act protects the interests of law enforcement.

- **Claim:** The act "could hamper the ability of Federal law enforcement to investigate and prosecute serious crimes like gang violence and child exploitation."
- **In fact:** The Act does not impede law enforcement's ability to investigate crimes.
 - The Act provides for disclosure when necessary to the investigation or prosecution of a crime, and requires disclosure when necessary to prevent death, kidnapping, or bodily harm.

- Virtually all states protect confidential sources, yet the Bush administration has not identified a single instance in which such protection impeded law enforcement at the state level.
- Attorneys General from 34 states recently urged the Supreme Court to recognize a federal reporters' privilege, stating that lack of a federal standard undermines state shield laws.

4. The Act would not allow terrorists to masquerade as “covered persons.”

- Claim: The Act “provides a safe haven for foreign spies and terrorists who engage in some of the trappings of journalism.”
- In fact: The definition of “covered person” has been amended by the Senate Judiciary Committee to exclude terrorists and foreign agents as defined under FISA, the Immigration and Naturalization Act, and Presidential Executive Orders.
- The privilege is **unavailable** to any “covered persons” if they commit or are an eyewitness to a crime OR if the exceptions for terrorism, national security or personal safety are triggered.

5. The Act would establish federal ground rules for prosecutors, civil litigants, journalists and sources, but would not alter current procedures used in court to review a request for a media subpoena.

- Claim: To identify the source of a leak, the government will be forced to “reveal even more sensitive and classified information.”
- In fact: Courts always have the power to view evidence *in camera*. Indeed, *in camera* review is a staple of court cases that relate to national security, such as the Judith Miller case, litigation over the government's surveillance program, and the government's prosecution of terrorism suspects.

6. The Act ensures that the public is informed about government and corporate misconduct.

- Claim: The Act is “unnecessary because all evidence indicates that the free flow of information has continued unabated in the absence of a Federal reporter's privilege.”
- In fact: Evidence of the chilling effect on journalists and their sources is very real.
 - William Safire, former N.Y. Times columnist, said in congressional testimony: “When a journalist is threatened with jail, or is jailed, for refusing to blow the whistle on a whistleblower, or to betray a trusted source, he or she feels a coercive chill. And when a reporter is faced with legal expenses that his mid-sized publication cannot afford to pick up, and the choice is “ratting out” a source or going into bankruptcy, that hits home hard. Don't believe that ordinary citizens as well as public officials won't think twice about trusting a reporter to respect a confidence --- it's happening right now as never before.” (House Judiciary Hearing 6/14/07)
 - According to former Time, Inc. Editor-In-Chief Norm Pearlstine, after Time complied with a court order and turned over journalist Matthew Cooper's notes, Time lost valuable sources “who insisted that they no longer trusted the magazine and that they would no longer cooperate on stories.” (Senate Judiciary Hearing 6/20/05)
 - If Toni Locy had known that she would risk personal bankruptcy for not revealing her confidential sources, she may not have reported on the government's mishandling of the anthrax investigation. If journalists fear jail or bankruptcy every time they write about high profile stories using confidential sources, they may just stop writing them because the personal cost is too great.