

## Shield Law Perils . . .

Bill Would Wreak Havoc on a System That Isn't Broken

By Patrick J. Fitzgerald  
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Today, the [Senate Judiciary Committee](#) will consider a "shield law" for journalists that would radically alter the way national security investigations are conducted. Unlike state shield laws, a federal shield law poses unique obstacles to the protection of national security. We must know whether the proposed law squarely addresses a real problem before taking such a significant step.

Let's start from the common premise that a robust and free press and fair and effective law enforcement are both vital to our democracy. Since the Supreme Court ruled 35 years ago that reporters are obligated to comply with grand jury subpoenas, there has been no shortage of whistle-blowers -- from Watergate to [Abu Ghraib](#). And the [Justice Department](#) operates under rigorous regulations restricting the issuance of subpoenas to journalists. These regulations, which require balancing the competing public interests in law enforcement and the flow of information to the media, have yielded only a trickle of subpoenas.

Against this background, a compelling case has not been made for jettisoning the legal framework that has guided this process for the past 35 years.

A threshold question lawmakers should ask is whether reporters will obey the law if it is enacted. They should ask because the Reporters Committee for Freedom of the Press calls for a shield law while urging journalists to defy the law when a court upholds a subpoena for source information. Any shield bill should require that a person seeking its protection first provide the subpoenaed information under seal to the court, to be released only if the court orders the information disclosed.

The proposed shield law poses real hazards to national security and law enforcement. The bipartisan Sept. 11 commission and the Robb-Silberman commission on prewar intelligence both found our national security at great risk because of the widespread leaking of classified information. The proposed law would have the unintended but profound effect of handcuffing investigations of such leaks. In many cases, authorities would face the Catch-22 of being required to prove specific criminal activity -- in a hearing before a judge, often resulting in notice to the subjects of investigation or their associates -- before they could take the investigative steps to determine whether criminal activity had occurred. In effect, the law would require "trial before investigation." Even worse, in cases involving leaks of classified information, the law would require the government to disclose in a hearing the specific damage caused by the leak -- information often more sensitive than the leak itself.

On a practical level, the bill would cause delays -- measured in years -- in national security investigations because prosecutors would be litigating (and appealing) instead of investigating serious crimes. As but one example, if classified nuclear secrets were published in a newspaper citing official sources at [the Pentagon](#), the [FBI](#) would need to litigate with the newspaper before being allowed to use subpoenas to follow the trail of the Pentagon's own telephone or e-mail records. And the FBI might well lose because the bill, puzzlingly, requires that agents prove that the leak occurred without relying on the newspaper article.

The bill would have other serious consequences. "Journalism" is so broadly defined that it includes not just newspapers and bloggers but also criminal organizations that disseminate information widely. In recent cases in [Chicago](#), this bill would have qualified as journalists:

- "Charity" groups that raised money through Internet postings, purportedly for widows and orphans, but that actually diverted the funds to groups affiliated with [al-Qaeda](#).
- An Iraqi spy who had a cover job as a journalist.
- A violent street gang that pirated a religious radio station to broadcast messages to gang members.
- Child pornographers who shared information over the Internet.

The shield bill appears to address the first two cases but does not. The bill does not protect people if the government proves they are acting on behalf of a foreign terrorist group or foreign power. But the bill also handcuffs investigators from taking the steps necessary to obtain that proof. The bill does not even purport to exclude domestic terrorists, gangs or pedophiles. No senator or legitimate journalist wants to extend protection to terrorists or other criminals, but such is the vice of a law defining journalism.

Any shield bill raises important questions for our democracy and warrants close scrutiny. Certainly those who advocate a shield law do not wish to compromise national security or public safety. Similarly, those who oppose such a law intend neither to cripple the free press nor to suffocate dissent. Before acting in this sensitive area, Congress should take care that any legislation addresses demonstrated needs and does not create dangerous unintended consequences for national security and law enforcement. Congress -- and the public -- ought to be assured that the people who propose the shield law will themselves obey it. The proposed bill fails all these tests.

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