THE DEMISE OF THE FEDERAL SHIELD LAW♦

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INTRODUCTION

If I aided the Government in its effort to prosecute my confidential source(s) for providing information to me under terms of confidentiality, I would inevitably be compromising my own ability to gather news in the future.

- James Risen[1]

As part of its unprecedented crackdown on leaking,[2] the Obama administration in late 2010 charged former CIA officer Jeffrey Sterling with unauthorized disclosure to *New York Times* reporter James Risen of national defense information about a CIA program to disrupt Iran's development of nuclear weapons.[3] When the government earlier in 2003 became aware of this leak, senior Bush administration officials such as Condoleezza Rice prevailed upon the *Times* not to publish Risen's article about the

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1 United States v. Sterling, No. 1:10cr485, 2011 WL 4852226, at *8 (E.D. Va. July 29, 2011) (quoting affidavit of James Risen).

2 Scott Shane, *U.S. Pressing Its Crackdown Against Leaks*, N.Y. TIMES, June 18, 2011 at A1 (stating that the Justice Department "shows no sign of rethinking its campaign to punish unauthorized disclosures to the news media, with five criminal cases so far under President Obama, compared with three under all previous presidents combined"); Jane Mayer, *The Secret Sharer*, NEW YORKER, May 23, 2011 at 46, 47 (noting that the Obama administration has pursued leak prosecutions with a "surprising relentlessness").

3 *Sterling*, 2011 WL 4852226, at *4.

secret program.[4] Nonetheless, Risen's 2006 book, *State of War: The Secret History of the CIA and the Bush Administration* contained a chapter, told from the perspective of a CIA case officer, describing an allegedly failed attempt by the CIA to provide Iran with faulty nuclear blueprints.

The government wants Risen to testify at trial about his relationship with Sterling. Like many journalists before him, Risen claims he could not cover national security, intelligence, and terrorism without confidential sources; he has repeatedly said he will not reveal his confidential sources.[5]

In what could prove to be a decision with far-reaching impact for the law of journalist's privilege, United States District Court Judge Leonie M. Brinkema relied on the First Amendment to quash the subpoena that sought testimony about Risen's sources. Brinkema wrote that a criminal trial subpoena is "not a free pass for the government to rifle through a reporter's notebook."[6] Because the government has other evidence, such as email messages, phone records, and computer files supporting its claim that Sterling leaked to Risen, the judge ruled that Risen's testimony was not critical to demonstrating Sterling's guilt.[7] The United States disputes the existence of a First Amendment-based journalist's privilege in the context of a criminal trial and is appealing Brinkema's decision to the Fourth Circuit.[8]

A Fourth Circuit decision affirming Brinkema's ruling would further reduce Congress' interest in passing a federal shield law. The sense of crisis surrounding the 2005 Valerie Plame leak investigation, marked by the jailing of *New York Times* reporter Judith Miller and the compelled testimony of reporters such as Matt Cooper of *Time* magazine, would become a faint memory. If the Fourth Circuit reverses Brinkema's decision and Risen goes to jail, the case for a federal shield law would become more compelling. The jailing of Risen, though, may not be enough to overcome the post-Wikileaks hysteria that has gripped Washington and the "broad belief . . . in both parties in Congress that leaks have gotten out of hand, endangering intelligence agents and exposing American spying methods."[9] Moreover, Risen, who in 2005 uncovered the Bush administration's warrantless wiretapping

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[4] Evan Perez, *Ex-CIA Official Charged in Leak on Iran Program*, WALL ST. J., Jan. 7, 2011, at A3.

[5] Clara Hogan, *Federal Judge Hears Arguments in Risen Subpoena Case*, REPORTER'S COMMITTEE FOR FREEDOM OF THE PRESS (July 7, 2011), http://www.rcfp.org/browse-media-law-resources/news/federal-judge-hears-arguments-risen-subpoena-case.

[6] *Sterling*, 2011 WL 4852226, at *13.

[7] *Id.*

[8] Notice of Appeal at 1, *Sterling*, 2011 WL 4852226 (No. 1:10cr485), *available at* http://www.fas.org/sgp/jud/sterling/101911-appeal279.pdf.

[9] Shane, *supra* note 2.

program,[10] is unlikely to garner much sympathy from Republicans.

As I wrote in *The Priestly Class*, an article published in this journal in 2006, the law of journalist's privilege is a mess. Privilege protections vary widely across jurisdictions; most state shield laws and federal First Amendment-based protections entail ad hoc balancing. Thus, neither the journalist nor the source "can accurately anticipate the mixture of variables—both legal and extralegal—that will determine whether their relationship remains confidential."[11] I advocated that Congress enact a uniform statutory privilege applicable to both state and federal proceedings. Congress came very close in 2009 to enacting a shield law[12]; however, the proposed legislation was deeply flawed. In the aftermath of Wikileaks' 2010 disclosure of a trove of classified diplomatic and military documents, and Republicans regaining control of the House in 2011, current prospects for a federal shield law are nil.

In this article, I show that the Supreme Court remains committed to treating the First Amendment's press and speech clauses as interchangeable. There is consequently little prospect of the Court revisiting *Branzburg v. Hayes*[13] and creating a First Amendment-based journalist's privilege. Any uniform federal shield protection will have to come from Congress, but as I explain, Congress has been unable to solve the problem of national security leaks in a manner that garners bipartisan support. Finally, I will discuss the challenge posed to shield laws by the emergence of bloggers and "citizen-journalists."

I. THE EQUAL STATUS OF THE PRESS AND THE PUBLIC

The Priestly Class explained that the equal status of the press and the public is a central aspect of *Branzburg* and subsequent Supreme Court cases.[14] Most recently, in *Citizens United v. Federal Election Commission*,[15] the Court reaffirmed its commitment to this First Amendment doctrine by striking down a law that allowed media corporations to fully participate in political dialogue but restricted candidate-advocacy by non-media corporations.

At issue in *Citizens United* was a federal law prohibiting corporate and union expenditures for candidate advocacy. During the 2008 primaries, Citizens United, a non-profit

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[10] James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.
[11] William E. Lee, *The Priestly Class: Reflections on a Journalist's Privilege*, 23 CARDOZO ARTS & ENT. L.J. 635, 664 (2006).
[12] Free Flow of Information Act of 2009, H.R. 985, 111th Cong. (2009).
[13] Branzburg v. Hayes, 408 U.S. 665 (1972).
[14] Lee, *supra* note 11, at 647, 655–57.
[15] Citizens United v. Fed. Election Comm. 130 S. Ct. 876 (2010).

corporation, sought to distribute via cable television a film it produced critical of Hillary Clinton, then a candidate for the Democratic presidential nomination. Media corporations were exempt from the law's restrictions. Thus, the activities that were illegal for Citizens United were legal for CNN and other corporations that the Federal Election Commission had classified as "press" or "media." Citizens United did not distribute the film via cable out of fear that doing so would trigger civil and criminal penalties. Its request for injunctive relief was denied and the case was appealed to the Supreme Court.[16]

Justice Kennedy's opinion for the Court struck down the law, reasoning that regardless of its source, political speech is "indispensable to decisionmaking in a democracy."[17] The media exemption was problematic for three reasons. First, the Court rejected the "antidistortion" rationale advanced to support the law because it feared this rationale could also support a restriction on the speech of media corporations.[18] Television networks and major newspapers owned by media corporations "have become the most important means of mass communication in modern times" and the First Amendment does not "condone the suppression of political speech in society's most salient media."[19] Second, the speech of media corporations is not entitled to greater constitutional protection than the speech of other corporations. "We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers[,]"[20] Justice Kennedy wrote. In essence, if Congress could not restrict the political speech of media corporations, nor could Congress restrict the speech of non-media corporations.

Finally, Justice Kennedy noted that it was becoming

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16 *Id.* at 886–88.

17 *Id.* at 904 (quoting First Nat'l Bank v. Bellotti, 435 U.S. 765, 777 (1978)). Justice Scalia, in a concurring opinion, claimed that the press clause meant everyone's right to publish, not the right of the institutional press to publish. *Id.* at 928 n.6 (Scalia, J., concurring). At the first oral argument, Scalia challenged the Government's defense of the press exemption, asking "But does 'the press' mean the media in the Constitutional provision?" He added, "Doesn't it cover the Xerox machine? Doesn't it cover the right of any individual to—to write, to publish?" Transcript of Oral Argument at 34, *Citizens United*, 130 S. Ct. 876 (2010). In his separate opinion, Justice Stevens argued that the drafters of the First Amendment "did draw distinctions—explicit distinctions—between types of 'speakers' or speech outlets or forms." 130 S. Ct. at 951 n. 57 (Stevens, J., concurring in part and dissenting in part).

18 *Id.* at 905 (stating that the "antidistortion rationale would produce the dangerous, and unacceptable, consequence that Congress could ban political speech of media corporations."); *see also id.* at 923 (Roberts, C.J., concurring) (stating the antidistortion rationale "would apply most directly to newspapers and other media corporations. They have a more profound impact on public discourse than most other speakers.")

19 *Id.* at 906.

20 *Id* at 905 (quoting Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 691 (1990) (Scalia, J., dissenting)).

increasingly difficult to distinguish the "media" from other speakers. "With the advent of the Internet and the decline of print and broadcast media, moreover, the line between the media and others who wish to comment on political and social issues becomes far more blurred."[21] That is, when a law prohibits speech at the core of the First Amendment's protection, distinguishing among speakers is constitutionally disfavored. This passage, however, should not be read as limiting congressional discretion to exempt the press—however defined—from content-neutral generally applicable laws. As long as Congress does not target First Amendment rights, or use impermissible criteria such as viewpoint, it has the policymaking authority to craft exemptions, such as a shield law, as broadly or as narrowly as it chooses. Stated differently, the press is not *entitled* to constitutionally-compelled exemptions from laws restricting the speech of other speakers, but Congress may exempt the press from those laws that do not restrict speech.

Although the Supreme Court rejects the idea of special constitutional status for the press, lower federal courts in the post-*Branzburg* era developed a highly contextual First Amendment-based journalist's privilege.[22] Journalists found in a series of bruising confrontations with courts in 2004 and 2005 that the judicial mood had changed; *Branzburg's* hostility to the "elevat[ion of] the journalistic class above the rest"[23] began to reshape judicial assessment of journalist's privilege claims. Journalists and their employers turned to Congress and for the first time since the early 1970s, shield law proposals were seriously considered by Congress.

II. RECENT PROPOSALS FOR A FEDERAL SHIELD LAW

Proposed shield law legislation was introduced in both the House and Senate during the 2005, 2006, and 2007 legislative sessions; a key sticking point was the protection offered to sources of national security leaks. The Bush administration repeatedly expressed strong reservations, claiming these proposals would "cripple the Government's ability to identify and prosecute leakers of classified information, and in the process would encourage more leaks that aid our enemies and threaten national security."[24] The threat of a veto effectively blocked these proposals.

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[21] *Id.* at 905–06.
[22] *See* McKevitt v. Pallasch, 339 F.3d 530, 532 (7th Cir. 2003) (summarizing the approach taken by some federal courts to a First Amendment-based journalist's privilege).
[23] *In Re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 972 (D.C. Cir. 2005).
[24] Letter from Michael B. Mukasey, Attorney General, and J.M. McConnell, Director of National Intelligence, to Harry Reid and Mitch McConnell, Senators, at 3 (Apr. 2, 2008) [hereinafter Mukasey & McConnell Letter], *available at* http://www.justice.gov/archive/opa/mediashield/ag-dni-ltr-s2035-040208.pdf.

As a presidential candidate in 2008, Barack Obama expressed support for a federal shield law. Consequently, the Democrat-controlled House approved a bill on March 31, 2009, but as the Senate Judiciary Committee was considering a similar bill, the Obama administration announced a harder line with national security leaks.[25] The Senate Judiciary Committee approved a bill incorporating changes negotiated with the Obama administration on December 10, 2009. Due to a crowded legislative calendar and more pressing matters, such as health-care reform, the full Senate did not consider the shield proposal in the last days of 2009.

At the heart of Republican opposition to the recent shield law proposals is a balancing test borrowed from Judge Tatel's concurring opinion in *In re Judith Miller*. Tatel proposed that judges balance the harm caused by a leak against the leaked information's value.[26] For example, the Free Flow of Information Act of 2007 proposed that in leak cases where the government sought from a journalist the identity of a source, a court determine the leak "has caused or will cause significant and articulable harm to the national security; and that the public interest in compelling disclosure [of the source] . . . outweighs the public interest in gathering or disseminating news or information."[27] According to the Bush administration, this would "encourage more leaks of classified information by giving leakers such a formidable shield behind which they can hide."[28] Moreover, allowing judges to define harm to national security cedes to the judiciary a classic executive branch function, one which the judiciary is ill-equipped to make.[29] Attorney General Mukasey and Director of National Intelligence McConnell warned legislative leaders that the balancing test, "to be applied by different Federal judges across the country, is a recipe for confusion and inconsistency."[30]

The compromise negotiated between the Obama administration and key Senate Democrats[31] treated national

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[25] Walter Pincus, *White House Toughens Its Stance on Journalist Shield Law*, WASH. POST, Oct. 2, 2009, at A5.
[26] *In re Judith Miller*, 397 F.3d at 997–98 (Tatel, J., concurring).
[27] Free Flow of Information Act of 2007, H.R. 2102, 110th Cong. § 2(a)(3)(D)(ii), 2(a)(4) (2007).
[28] Executive Office of the President, Statement of Administration Policy, H.R. 2102—Providing conditions for the Federally compelled disclosure of information by certain persons connected with the news media (Oct. 16, 2007), *available at* http://www.justice.gov/archive/opa/mediashield/hr2102sap-h-101607.pdf.
[29] Letter from Brian A. Benczkowski, Principal Deputy Assistant Att'y Gen., to Lamar S. Smith, Representative, at 9–10 (July 31, 2007) [hereinafter Benczkowski Letter] (on file with author).
[30] Mukasey & McConnell Letter, *supra* note 24, at 3.
[31] Letter from Dennis C. Blair, Director of National Intelligence and Eric H. Holder, Jr., Attorney General, to Patrick J. Leahy, Senator (Nov. 4, 2009) [hereinafter Blair and Holder Letter], *available at*

security leaks in two different ways. In cases where the information sought would assist the government in preventing or mitigating an act of terrorism or other acts that are likely to cause *significant* harm to national security, no balancing test would apply; compelled disclosure of a journalist's source would be expected. Moreover, courts assessing the extent of harm in these cases were directed to "give appropriate deference to a specific factual showing" by the head of any executive branch agency."[32] Other national security leak cases, like most civil and criminal cases, required courts to consider whether the journalist "established by clear and convincing evidence that disclosure [of the source] . . . would be contrary to the public interest, taking into account both the public interest in gathering and disseminating the information or news at issue . . . and the public interest in compelling disclosure (including the extent of any harm to national security). . .."[33]

Outside of the very narrow context of serious harm to national security, judicial balancing of subjective factors such as news value was the norm under the 2009 compromise.[34] In *The Priestly Class*, I criticized this type of balancing because a source considering whether or not to leak would have to be "clairvoyant to anticipate how a court would later balance the newsworthiness of a leak against its harmful effects."[35] Any shield law that includes a balancing test focuses on the wrong moment in time. Journalists and sources need certainty when they negotiate the terms of their relationship. A shield law with an open-ended balancing test serves neither journalists nor sources well. And, a highly subjective balancing test is fodder for Republicans intent on attacking "activist judges."[36]

The proposed shield law was designed to encourage exposure of scandals and corruption in government,[37] even if this meant

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http://www.rcfp.org/newsitems/docs/20091105_155125_letter.pdf (outlining Obama administration support for compromise proposal); Walter Pincus, *White House, Senators Agree on Media Shield Law*, WASH. POST, Oct. 31, 2009, at A2.

[32] Free Flow of Information Act of 2009, S. 448, 111th Cong., § 5(b) (2009).

[33] *Id.* at § 2(a)(2)(A)(iv). Notice the burden placed on journalists, rather than the government, in this proposal.

[34] *Id*. at § 2.

[35] Lee, *supra* note 11, at 669. Others have commented on the unpredictability of Tatel's balancing test. *See In Re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 984 (D.C. Cir. 2005)(Henderson, J., concurring) (test lacks analytical rigor); Lee v. Dep't of Justice, 401 F. Supp. 2d 123, 139 (D.D.C. 2005) (judicial determination of the newsworthiness of a story "would create a subjective and elastic standard whose outcome could not be predicted").

[36] Senate Judiciary Committee Republican Press Office, Myth vs. Fact on "Media Shield" (Sept. 17, 2009) (on file with author).

[37] *See, e.g.*, H.R. REP. NO. 110-370, at 7 (2007) (noting stories such as Watergate, the Pentagon Papers, Iran-Contra that would not have been possible without confidential sources). It did not help garner Republican support that the examples used by Democrats were often Watergate and Iran-Contra, two Republican administration debacles.

violation of laws concerning unauthorized disclosure of classified information. Republican opposition, however, focused on the idea that there "is no virtue in leaking; it reflects a profound breach of trust and is wrong and criminal."[38] As a senior Republican aide with the Judiciary Committee told the *Washington Times* (on background, of course):

> "The debate on this issue comes down to a simple proposition. Federal law makes it a felony for anyone with classified information to provide it to unauthorized people—and that includes reporters. You either believe it's a crime, or you believe the press should have an unfettered right to seek out and publish classified information. That's the fundamental difference between Republicans and Democrats on this bill," the source says.[39]

Republicans repeatedly emphasized the illegality of unauthorized disclosures of classified information in Congressional debates.[40] It will likely continue as a central plank of Republican opposition to a shield law. In the current polarized political environment, bridging these two disparate views of leaks seems impossible.

Support for a federal shield law evaporated in 2010 as Wikileaks began posting a trove of classified documents.[41] Senator Schumer, a key sponsor of the shield bill, announced he would add language to the bill explicitly excluding organizations like Wikileaks,[42] but the damage had been done. When Republicans regained control of the House after the 2010 elections, legislative priorities shifted; tellingly, Representative Mike Pence was unable to attract any co-sponsors when he reintroduced a shield law

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38 *Reporters Privilege Shield Legislation: Preserving Effective Federal Law Enforcement: Hearing Before the S. Comm. on Judiciary*, 109th Cong. 10 (2006) (statement of Paul McNulty, Deputy Att'y Gen.).

39 Jennifer Harper, *Inside the Beltway*, WASH. TIMES, Sept. 17, 2009, at A7.

40 *See, e.g.*, Remarks of Rep. King who spoke in opposition to a shield bill by stating "Mr. Speaker, I would bring up the issue of our national security. Some of the people who hide behind the shield of journalism today routinely release classified national security data and publish it as if it were their patriotic duty and hide behind the shield of journalism." CONG. REC. H11596 (daily ed. Oct. 16, 2007). Rep. Issa added, disclosures of government secrets "can be treasonous, and reporters should not be able to protect individuals who jeopardize our national security." *Id.* at H11599.

41 Jeffrey Benzing, *Falling on Their Shield*, AM. JOURNALISM REV., June/July 2011, *available at* http://www.ajr.org/article.asp?id=5029 (noting the damage to Congressional support for a shield bill caused by Wikileaks); J.C. Derrick, *Proposed Federal Shield Law Resurfaces Again*, NEWS MEDIA & L., Fall 2011, at 8. *See generally Espionage Act and the Legal and Constitutional Issues Raised by Wikileaks: Hearing Before the House Judiciary Comm.*, 111th Cong. (2010).

42 Press Release, Office of Senator Charles Schumer, Schumer to Add New Language to Senate Media Shield Bill to Affirm Wikileaks Doesn't Qualify for Protection (Aug. 4, 2010), *available at* http://schumer.senate.gov/record.cfm?id=326952& (announcing that Schumer will craft language explicitly excluding organizations whose sole or primary purpose is to publish unauthorized disclosures of documents from protection).

proposal in 2011.[43]

III. WHO IS A JOURNALIST?

In the first *Citizens United* oral argument, Justice Scalia facetiously asked if the term press meant people wearing fedoras with a ticket saying "Press" in the hatband—in short, the classic old school image of a journalist.[44] The fedora definition of journalist, however, is no more outdated and limiting than the definitions contained in many state shield laws.[45] Defining who is entitled to coverage under a shield law is a most vexing problem; if coverage is too broadly defined, the law may protect terrorists or other criminal organizations. Federal shield law proposals that covered an "astonishingly broad class" were abhorrent to the Bush administration.[46]

The recent Occupy Wall Street protests illustrate how individuals are bypassing the mainstream news media and redefining the term journalist. Occupy Wall Street protestors criticized the mainstream press first for ignoring the movement and then marginalizing it.[47] In response, some took matters into their own hands, live-streaming video to the Internet from cellphones and other devices. As reported by the *New York Times*, "With cellphones, iPads and video cameras affixed to laptops, Occupy participants showed that almost anyone could broadcast live news online."[48] Tim Pool, whom the *New York Times* dubbed a "citizen journalist," used borrowed equipment to produce video from Zuccotti Park for the website Ustream. Pool's channel had as many as 28,000 simultaneous viewers and has had more than 874,000 views since September.[49] Under the shield laws of most states, Pool would not be classified as a journalist.

Most state shield laws cover those connected to "newspapers, radio, television," or the "news media." These laws generally exclude book authors, freelance writers, academic researchers and

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[43] Free Flow of Information Act of 2011, H.R. 2932, 112th Cong. (2011).

[44] Transcript of Oral Argument at 34, Citizens United v. Federal Election Commission, 130 S. Ct. 876 (2010); *see also #92 Fedoras*, STUFF JOURNALISTS LIKE, http://www.stuffjournalistslike.com/2009/12/92-fedoras.html (last visited Feb. 6, 2012) (stating that for "journalists, their legacy will forever be encapsulated in the timeless, the classic – the fedora.").

[45] As Bruce Sanford, a leading Washington media attorney noted, "Media law fashioned for the traditional press of the 1960s needs a considerable amount of renovation to apply to 21st-century digital communications. The whole house isn't a tear-down, but it's more than a paint job—rewiring at a minimum." David Carr, *In $2.5 Million Judgment, Court Finds Blogger Is Not a Journalist*, N.Y. TIMES BLOG (Dec. 8, 2011, 2:21 PM), http://mediadecoder.blogs.nytimes.com/2011/12/08/in-2-5-million-judgment-court-finds-blogger-is-not-a-journalist.

[46] Mukasey & McConnell Letter, *supra* note 24, at 6.

[47] Brian Stelter, *Protest Puts Coverage in Spotlight*, N.Y. TIMES, Nov. 21, 2011, at B1.

[48] Jennifer Preston, *Occupy Video Showcases Live Streaming*, N.Y. TIMES, Dec. 12, 2011, at B1.

[49] *Id.*

others not working in news organizations.[50] For example, the New Jersey Supreme Court recently ruled that those who post messages on Internet bulletin boards were not covered by New Jersey's shield law. The state supreme court found that online message boards are not *similar* to the types of news entities listed in the statute.[51]

Many of the 2005-2007 proposals for a federal shield law sought to cover more people than do state laws, leading to intense opposition by the Bush administration. For example, one proposal defined a covered person as "a person who, for financial gain or livelihood is engaged in journalism."[52] The Department of Justice objected because the Internet enables "virtually anyone" to be engaged in journalism for financial gain. "Many blogs or websites run by people who have other jobs and livelihoods also generate advertising revenue. . . . A simple banner advertisement of the sort that appears on literally thousands of blogs worldwide would likely be sufficient to establish" the individual running the blog was engaged in journalism for financial gain.[53] The Department posited a range of scenarios in which material posted on blogs, websites, community forums or other media "far removed from traditional forms of journalism" would be covered, to the "detriment of both effective law enforcement and,

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[50] KENT R. MIDDLETON & WILLIAM E. LEE, THE LAW OF PUBLIC COMMUNICATION 2012 UPDATE 549 (8th ed. 2011).

[51] Too Much Media, LLC v. Hale, 20 A.3d 364, 368 (N.J. 2011). The New Jersey privilege statute requires that the person claiming the privilege must have some nexus, relationship or connection to "news media" and that term is defined as "newspapers, magazines, press associations, news agencies, wire services, radio, television or other similar printed, photographic, mechanical or electronic means of disseminating news to the general public." N.J. STAT. ANN. § 2A:84A-21a (West 2011). The New Jersey Supreme Court found that comments on a message board were like a "pamphlet full of unfiltered, unscreened letters to the editor" submitted for publication. *Hale*, 20 A.3d at 379. "Neither writing a letter to the editor nor posting a comment on an online message board establishes the connection with the 'news media' required by the statute," the state court said. *Id.* The legislature was free to reconsider, in light of changing technology, the definition of a newsperson and "add new criteria to the Shield Law." *Id.* at 383. In a similar Oregon case, a self-described "investigative blogger" was recently held to not be covered by that state's shield law. Obsidian Fin. Group, LLC v. Cox, CV-11-57-HZ, 2011 WL 5999334 (D. Or. Nov. 30, 2011). The Oregon shield law requires that a person must be connected with, employed by, or engaged in any medium of communication to the public, OR. REV. STAT. § 44.520 (West 2003), and the term medium of communication is defined as "any newspaper, magazine, or other periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system." OR. REV. STAT. § 44.510(2) (West, Westlaw through 2005 amendments). The court found the blogger failed to show that she is affiliated with any of the media listed in the statute. *Obsidian*, 2011 WL 5999334, at *5.

[52] Benczkowski Letter, *supra* note 29, at 11 (discussing Manager's Amendment to H.R. 2102). As a result of Bush Administration opposition, the shield bill approved by the House on October 16, 2007, tightened the definition of covered person by requiring that newsgathering and publishing activities be undertaken "for a substantial portion of the person's livelihood or for substantial financial gain . . . ." H.R. 2102, 110th Cong. § 4(2) (2007).

[53] Benczkowski Letter, *supra* note 29, at 12.

ultimately the safety of the American public."[54] Finally, the Bush administration questioned whether a definition of a covered person that is not over- or under-inclusive is "possible as a practical matter."[55]

The compromise reached by the Obama administration and Senate Democrats in 2009 eliminated language from a proposed bill requiring that a covered individual be employed by a news organization. Under the compromise, coverage would be available to "freelance authors, people who write for local news outlets without pay and, potentially, to many bloggers."[56]As defined by the Judiciary Committee, to be a covered person, one had to meet the following test: a) have "primary intent to investigate events . . . to disseminate to the public news," b) regularly gather information by conducting interviews, making direct observations, or collecting documents, and c) the information must be sought in order to be disseminated by means of print, broadcasting, electronic or other forms of communication.[57] Moreover, there were important exclusions relating to terrorism.[58] The latter in particular satisfied the national security concerns of the Obama administration.[59]

Wikileaks rendered all of this for naught. At least the definition of "covered person" approved by the Judiciary Committee provides a useful template for states considering modernizing their shield laws to include bloggers and others creating new forms of journalism.

CONCLUSION

Given the impasse in Congress, the executive branch can protect journalists by reverting to long-established Department of Justice policy that leak investigators simply do not question journalists.[60] This provides greater certainty to journalists and sources than legislative proposals allowing judges to assess the news value of a leak and balance that value against the harm caused by the leak.

As I wrote in *The Priestly Class*, a shield law should be considered as a component of information policy and assessed in

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[54] *Id.* at 13–14.
[55] *Id.* at 14.
[56] Pincus, *supra* note 31. Representative Pence's most recent proposal, H.R. 2932, 112th Cong. § 4(2) (2011), returns to definition approved by the House in 2007. *See supra* note 52.
[57] S. 448, 111th Cong. § 11(2)(A) (2009).
[58] *Id.* at § 11(2)(C).
[59] Blair and Holder Letter, supra note 31, at 2 (stating that the definition of a covered person has been "much improved").
[60] William E. Lee, *Deep Background: Journalists, Sources, and the Perils of Leaking*, 57 AM. U. L. REV. 1453, 1470-71 (2008).

relation to other laws, such as whistleblower protections and internal security measures.[61] Although Wikileaks appears to have irreparably damaged the prospects for a shield law for the near term, its disclosures of classified materials have motivated Congress and the executive branch to initiate long-needed reforms of the methods of protecting classified information.[62] The system of classifying information, however, remains seriously broken;[63] "overclassification" provides a powerful incentive to leakers, who, as Daniel Ellsberg of the Pentagon Papers recently noted, "believe some things are wrongfully kept secret."[64] Moreover, the Espionage Act is an unwieldy instrument for prosecuting government leakers.[65] Reform of those measures will be difficult, but necessary steps before Congress turns its attention again to a federal shield law.

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[61] Lee, *supra* note 11, at 677–78.

[62] *See, e.g.*, Exec. Order No. 13,587 (Oct. 7, 2011) (ordering structural reforms to improve the security of classified information on computer networks); National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-081, § 922 (2011) (mandating that the Secretary of Defense establish an information security program for detecting unauthorized access to, use of, or transmission of classified information).

[63] Elizabeth Goitein & J. William Leonard, *America's Unnecessary Secrets*, INT'L HERALD TRIB., Nov. 9, 2011, at 8 (noting that Defense Department and National Security Council experts estimate that anywhere from 50 percent to 90 percent of classified documents could safely be made public).

[64] Ginger Thompson, *Hearing in Soldier's Wikileaks Case Ends*, N.Y. TIMES, Dec. 22, 2011, at A15.

[65] The collapse of the government's case against alleged leaker Thomas Drake illustrates the difficulty of Espionage Act prosecutions. Initially, the government charged Drake with ten felony counts related to a scheme to disclose information to a *Baltimore Sun* reporter. Indictment at 1-13, United States v. Drake, No. 10-181, 2010 WL 1513342 (D. Md. Apr. 14, 2010). When the judge ruled the government could not shield certain references to classified technology on the grounds that it would harm Drake's defense, the government chose to withdraw documents that were crucial to proving the Espionage Act charges. Ellen Nakashima, *Files in Leak Case Are Pulled*, WASH. POST, June 9, 2011, at A1. Drake then accepted a deal in which he agreed to plead guilty to a misdemeanor charge of exceeding his authorized use of a computer, but served no jail time. Brent Kendall, *Plea Deal Ends Leak Case Against Former Official*, WALL ST. J., June 10, 2011, at A7; *see generally* Ellen Nakashima & Jerry Markon, *NSA Leak Trial Exposes Dilemma for Prosecutors*, WASH. POST, June 11, 2011, at A4 (noting that the Drake case "exposes a fundamental dilemma in prosecutions involving national security: How do you prove that a leaker released sensitive information without discussing that information in public?").