

WHEREIN EMPTYWHEEL DISAGREES WITH PATFITZ

As some of you might remember way back, I first got sucked into the Plame investigation when Judy Miller was heading to jail. I found her appeal to a non-existent reporter's privilege a farce, given that her relationship with the Bush Administration had long dropped any pretense of journalism.

So it may surprise you that I think Patrick Fitzgerald uses the wrong approach in his editorial lobbying against the shield law before Congress. Mind you, I don't think his intent is wrong—I find the shield law flawed on several counts. But his argument doesn't admit the problematic context in which leaks currently exist.

For example, Fitzgerald is speaking exclusively as a prosecutor when he complains about the way the shield law would hamper any investigation of national security leaks. I take his representation at his word—I trust the shield law **would** make it nearly impossible to investigate the kinds of leaks (through Judy to the Islamic charities, through Judy-Cheney hoped-to out Plame) Fitzgerald has been investigating. Not surprisingly (in this he is as consistent as always), he accepts that leaks endanger national security, citing Robb Silberman and 9/11 Commission.

Yet before we get to the point where we're basing arguments on a shield law, we need to accept that—over-classification, willful Administration leaks, and refusal to submit to the oversight of citizens is just as serious a danger to our country as leaks about warrantless wiretapping. That is, when we've got a government that has refused to submit to the transparency on which our government relies; it has made the entire classification system into

one big bureaucratic joke, a tool of the abuse of power. Which doesn't mean you shouldn't investigate leaks (on the contrary, it'd be nice to actually bust these guys for breaking their own rules). But it doesn't mitigate the need to provide some protection for real journalism. There are people who could be prosecuted under the Espionage Act who we, as a society, would prefer avoid any prosecution. While many journalists have proved remarkably unable to judge which are the good leaks and bad leaks, the judiciary should not be in a position to determine which leaks serve the interests of the citizen and which do not (after all the judiciary should administer the law equally, not determining which of Dana Priest's and Eric Lichtblau's sources were good or bad leakers). So perhaps the thing to do is first amend the Espionage Act, to eliminate the danger that important leaks will be punished, before we rest easy with the current system.