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Dropping the Schorr Case

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An underlying condition of Anglo-Saxon democracy is that sensible people do not press to the limit questions to which there are no good answers. That rule of thumb applies with a vengeance to the current investigation by the House ethics committee of the intelligence committee report given by Dan Schorr of CBS News to the Village Voice.

The investigation touches an unsettled area of constitutional law. The interest of all parties—including both the Congress and especially the press—is that the unsettled area be kept unsettled, that the moment of constitutional truth be avoided.

The elementary facts of the case are simple. A House committee under Congressman Otis Pike prepared a report on activities of the Central Intelligence Agency. Copies of the report were acquired by Mr. Schorr of CBS and John Crewdson of the New York Times. Both men made known the contents of the report through their respective news agencies.

The full Congress then voted to make the report secret. Whereupon, Mr. Schorr, after some complex maneuvers, passed his copy off to the Village Voice, a weekly put out in New York, which it claimed, possibly wrongly, was the full text of the report.

That sequence of events set up a potential conflict between two traditional rights rooted in the Constitution. One is the freedom of the press, as guaranteed by the First Amendment. The other is the right of the Congress to discipline its members, and to punish by contempt proceedings persons refusing to cooperate with legitimate congressional investigations.

The freedom of the press and the First Amendment need no endorsement in this quarter. Democracy means government by the people which implies open discussion and the circulation of information as distinct from enforced orthodoxy. The right to a free press is thus a peculiarly cherished feature of our system, rightly enshrined in the Constitution.

The exercise of that right was central to revelation and prosecution of the Watergate scandal, and to the public awareness of the true nature of the Vietnam war. The right deserves to be guarded jealously, as it was by those who successfully fought in the Supreme Court the attempt of a Nebraska judge to apply a gag rule to coverage of a murder trial.

By extension, moreover, the First Amendment confers certain rights and privileges. The courts have given almost blanket immunity to news agencies against civil suits for libel. But the privileges and rights growing out of the First Amendment are not unlimited—especially in the eyes of the present Supreme Court. Thus in 1972 the Supreme Court, in the Branzburg case, held that the right of a grand jury to investigate crimes took precedence over the First Amendment privilege. In consequence, reporters are now obliged to divulge sources to grand juries in criminal cases.

The same issue is potentially posed by the Schorr case, with the congressional committee in the place of the grand jury. The ethics committee clearly has the right to investigate the leak of the secret report.

It can discipline congressmen and staff members responsible for the leak. It can certainly subpoena Mr. Schorr and, if he refused to answer questions, hold him in contempt.

So far the committee has refused such an approach. Wisely, I think, from its point of view. Politically, the Congress would suffer by pressing to the ultimate a case in which the breaking of the secrecy seal caused no discernible harm.

But those of us in the press should not be gloating over the committee's behavior. We should be applauding its restraint. For we have nothing to gain from a constituional test of First Amendment rights against the congressional right to discipline and investigate. On the contrary, the circumstances of the Schorr case suggest that it affords the weakest possible ground for such a test.

Mr. Schorr, though a veteran reporter with a fine record, seems recently to have been prompted as much by entrepreneurial and self-glorification interests as by civil liberties considerations. At one point he offered to write up the material in a series of newspaper articles. At another he made it a condition of publication that he write the introduction to the text.

In the end, after having refused bona fide offers from responsible press organs to print parts of the text they thought were newsworthy, he let it go to a paper with poor credibility which used the document, as Laurence Stern pointed out in the Columbia Journalism Review, for heavily promotional purposes. It is even asserted by Mr. Stern and Nora Ephron in Esquire Magazine, though denied by Schorr, that when the going got rough inside CBS, he had a brief fling at trying to put the blame on a colleague, Leslie Stahl.

What is at stake here, is professional behavior, not constitutional liberty. We will all be better off if the affair is allowed to fade away without being made a federal case.