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The Case Against a Press Shield Law

I can't help but see an element of irony in the combination of issues now before the House Judiciary Committee. While the impeachment inquiry is proceeding—precipitated to a great extent by the press' dogged pursuit and exposure of the truth—the committee is preparing to resurrect the smoldering issue of so-called newsmen's privilege.

This week, the subcommittee which held lengthy hearings on this issue a year ago, is scheduled to report a long-dormant qualified privilege bill to the full committee. The appealing idea behind a shield law for reporters is that Congress should step in to protect the public's right to know by repairing the damage to press freedom inflicted by the 1972 U.S. Supreme Court Branzburg decision. The proposal is designed to shore up the First Amendment by enacting into law a testimonial "privilege" for newsmen—allowing reporters to protect their confidential sources and information—which the court held was not provided in the Constitution.

Supporters of such legislation contend that the Branzburg decision has had a chilling effect on news sources. It is argued that many prefer to remain silent rather than gamble that a reporter will choose to go to jail instead of revealing his source's identity. This in turn has impeded the free flow of information by "drying up" important news sources. During hearings on proposed newsmen's privilege legislation, the stated goal of most of the media was an unqualified shield law. Many witnesses, including some reporters who had been jailed for refusing to disclose confidential information, argued persuasively that no law at all would be preferable to a qualified statute riddled with loopholes through which the chilling wind of Branzburg could blow.

But the realities of Congress made this goal unattainable. Since last summer, when the subcommittee approved a qualified privilege bill, the search has been on to find language that could make a qualified shield acceptable to the all-or-nothing proponents. It is both amazing and perplexing to me that this apparently has been accomplished. Most major media organizations have pledged their support to the proposal if the full committee approves amendments to be offered by Subcommittee Chairman Robert Kastenmeier (D-Wisc.)—amendments which leave the bill providing only qualified privilege.

This is what I find so ironic. How can it be at this time, which some have proclaimed the press' finest hour, that the media is not only willing to accept but even ready to advocate a qualified privilege? The Watergate affair stands out as a perfect example of the need for an unfettered press, free from the intrusions of government in the performance of its news-gathering duties. I am surprised that in the midst of the kind of increased dedication to courage, skill and accuracy that can deny its critics their excuses for intimidation, the press seems even more determined to seek statutory protection, even if it means accepting a defective shield. I have strong doubts that even this watered-down compromise proposal will become law. Even if it somehow breezes through the committee with the Kastenmeier amendments intact, the bill would run into brutal opposition on the floor.

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On the one hand, opponents will contend that it offers too much, that newsmen are not a privileged caste to be exempted from the duties of other citizens. The apprehension that reporters would abuse such a privilege surfaced often during our hearings a year ago. Critics reached to the bounds of their imaginations to conjure up hypothetical cases in which a reporter's invocation of a testimonial privilege could be damning to the public interest. There is also the threat that by meeting the essential requirement of broadly defining "newsman" the privilege could be abused by persons it was never intended to cover. A third complaint aimed at any kind of shield law is that it could foster irresponsible reporting by exempting the media from the questionable form of accountability subpoenas present.

On the other side, it can be argued that the proposal falls far short of the need. A qualified shield law could aggravate the problems facing the press. By setting forth circumstances in which a reporter could be required to reveal the identity of a confidential source, the so-called privilege could actually invite harassing subpoenas. Indeed, the shield proposal goes beyond the Supreme Court decision in opening the door to governmental interference with the press.

It appears clear to me that enactment of such a law would run contrary to the hopes of those who view the shield as a means to advance the free flow of information in this nation. Instead of accomplishing this goal, I think the qaulified privilege approach would serve to further muffle the important voices of confidential sources.

So, what is the answer to the chilling effect of Branzburg? I personally do not believe it is within the power of the 93rd Congress to devise a *dues ex machina* to close this controversy with a happy and satisfactory ending. The First Congress enacted the best, and in the long run the only workable shield law—the First Amendment.

By enacting any kind of shield law, Congress would be setting the dangerous precedent of legislating within the realms of the First Amendment. If the press is open to laws which provide privileges, it must also be susceptible to laws that can regulate or curtail its freedom. As we on the Judiciary Committee are well aware from our study of the definition of impeachable offenses, the founding fathers could write general and flexible standards into the Constitution. However, they did not do so in the First Amendment. I believe that the admonition "no law" is most clear.

Judge Harold Medina has suggested that instead of running to Congress for a shield, the press should be "fighting like tigers" in the courts until the right of confidentiality of sources is recognized. I agree that the courts are the arena for this question. But, beyond fighting to quash harassing subpoenas and appealing unjust contempt citations, I believe the press can best advance its position by doing its job. The media stand a much better chance of winning freedom from subpoenas and government interference through vigorous, accurate and fair reporting than by lobbying on Capitol Hill.

Of course, Congress also has a responsibility in this area. Our job is to pursue the attack on governmental secrecy, the abuse of executive privilege and the proliferation of document classification. Our job is to start being a better watchdog for the public instead of abdicating so much of this responsibility to the media.

The kind of reporting that disclosed Watergate should prod Congress to be more alert in its duty to protect the public interest. The enactment of a shield law would be an irreparable step away from that goal.