

Protection of the P.R.E.S.S.

Late in January, media in this country got exciting news! The U.S. House of Representatives passed the PRESS Act which would provide journalists a federal shield law protecting confidential sources from immediate discovery in any federal investigation. Further, the bill prevents data from cell phones and other telecommunications devices from being seized by federal authorities prior to notice being given to the journalist and an opportunity to challenge the seizure in court.

(As an aside, I'd like to thank those Missouri representatives who voted to support it. But Congress' website says "On motion to suspend the rules and pass the bill Agreed to by voice vote." So, no record of a vote to haunt anyone. I will presume every U.S. Representative from our state supported it.)

This bill, in one form or another, has been pending for decades in Congress. The "Protect Reporters from Exploitative State Spying" Act specifically includes those who regularly gather, collect, photograph, record, write, edit, report, investigate or publish news on the local, national and international level. It protects us from entities or employees of the judicial or executive branch or an administrative agency of the federal government who has power to issue a subpoena or otherwise compel access to information.

It covers not only employer-provided accounts containing information but also covers personal accounts or "personal technology devices" and protects "any information identifying a source who provided information as part of engaging in journalism," including all related papers and documents.

Prior to obtaining access, the federal entity must give notice to the journalist and allow the journalist to go to court and seek court protection. The court must find that disclosure is necessary "to prevent, or to identify any perpetrator of, an act of terrorism" against this country or that disclosure

is necessary "to prevent a threat of imminent violence, significant bodily harm, or death...." Without evidence meeting those standards, there will be no compelled disclosure.

And the Act contains limitations on what content may be sought and limitations on the breadth of the Act. (Unfortunately, it doesn't apply to libel and slander claims under state law, even if they are brought in a lawsuit in federal court.)

So, it's not everything. But it's something. Inasmuch as Missouri's shield law protection is thinner than the piece of paper you are reading this on, it's a good tool to add to your toolkit. On the state level, there are only a couple of cases where a court had addressed a journalists' shield law privilege. One of the most commonly cited is State of Missouri ex rel Classics III, Inc., v. Ely, a 1997 decision by a Missouri appellate court that held source disclosure in a libel case requires proof relating to four elements that are then balanced by the court in making its determination.

Those are: 1) whether the movant has exhausted alternative sources of the information; 2) the importance of protecting confidentiality in the circumstances of the case; 3) whether the information sought is crucial to the plaintiff's case; and 4) whether the plaintiff has made a prima facie case of defamation.

Efforts have been made in the Missouri legislature to pass a shield

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law many times, unsuccessfully.

So, the PRESS Act now goes to the U.S. Senate, where it seems the odds are good for passage.

Can we count on Missouri's senators to support this bill? I cannot find any record online of any statement made by either Senator Josh Hawley or Senator Eric Schmitt stating their position for or against a shield law policy. If you as a reporter run into either of them in the next few weeks, it might make a

good story to see what you can draw out of them.

And if you are a publisher, I'd urge you to drop our Senators a note reminding them that this bill is very important to protect your First Amendment rights. Senator Hawley repeatedly touts his constitutional law "street cred".

Senator Schmitt actually relied on a First Amendment defense similar to a shield law in litigation back in 2019 as Attorney General, when he claimed while defending a libel case against a state representative that the identity of constituents who made complaints against that legislator deserved protection from discovery. Surely, he'll understand.



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