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Supreme Court, Congress have privilege on agendas

Federal shield law being discussed

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The issue of reporter's privilege in Missouri — the protection that a reporter holds dear not to have to reveal sources when they have been promised confidentiality — has always been a subject of great dispute among those practicing law in this state.

Missouri has never been a state with a shield law. While lawyers have argued for many years that the federal constitution and state constitution, and the free press provisions contained therein, formed the foundation of a constitutional privilege in the state, we didn't really have a case recognizing that privilege until in the 1990s, when a court decision put a solid stamp of approval on a form of the privilege within Missouri.

Many other states have adopted actual statutes or adopted a privilege by case law. In all cases the privilege has generally been based upon the basic three tenants of:

1. A plaintiff having to first prove that the information sought is not available from any other source;
2. That it is critical to the case the plaintiff seeks to make, and
3. Whether this critical need for this information overrides the constitutional or statutory right of the reporter to protect his or her sources.

On the federal level, the foremost case dealing with reporter privilege was Branzburg v. Hayes, in which the court said a reporter who witnesses criminal actions may not claim a privilege to prevent them from testifying about what they observed. But media lawyers took hope in secondary opinions arising out of that case that commented about a qualified privilege for reporters and that eventually became the foundation on which most states' privileges are based.

Further, in the years since Branzburg, some of the federal circuits have recognized a reporter's privilege, although again those circuits have not all adopted quite the same standard.

This year observers of the reporter's privilege issue have had two reasons to rejoice.

First, the Supreme Court is looking at two cases in which the reporter's privilege issue is raised. And bills have been introduced in Congress that could create a federal reporter's privilege standard.

The Supreme Court case is actually the consolidation of two cases — one was a federal subpoena issued to Judith Miller of The New York Times seeking her source in connection with a grand jury investigation of the leak of a CIA agent's name. The other case involved a subpoena to Matthew Cooper and Time Magazine for similar information.

In February the U.S. Court of Appeals for the District of Columbia had held that these two individuals would be required to testify about these sources, refusing to recognize a privilege that would prevent them having to testify before a grand jury. In short, the appellate court found that Branzberg controlled and that there was no Supreme Court opinion which had overruled that holding.

So now the matter has been appealed to the U.S. Supreme Court. The case, if accepted, will be heard this fall or winter. Of course, the court may choose not to grant certiorari and the case will fall back to the lower court opinion.

Meanwhile, a group of 34 state attorneys general joined to file an amicus brief with the court in May, asking that it accept the case and look further at creating a federal reporter's privilege. Jay Nixon, Missouri's attorney general, chose not to sign the brief. (Neither did the attorneys general of Illinois or Kansas.)

This amicus brief noted that 49 states and the District of Columbia now recognize some form of reporter's privilege. "...[A]ll rest on a legislative or judicial determination that an informed citizenry and the preservation of news information sources are of vital importance to a free society," the brief states, continuing, "Without such a privilege, reporters in those States would find their newsgathering abilities compromised, and citizens would find themselves far less able to make informed political, social and economic choices."

Meanwhile the "Free Flow of Information Act" was introduced both in the House of Representatives and in the Senate in early 2005. A second bill called "The Free Speech Protection Act" also was introduced in the Senate. All of these create an absolute privilege against disclosure of confidential sources and a qualified privilege relating to other circumstances.

Neither bill has seen much movement, but the benefit to federal legislation (unlike bills in the Missouri legislature that die at the end of each session — and in some cases that is a very good thing for the Fourth Estate in Missouri) is that these bills will continue to float and, hopefully, gather support.

(The FFI Act is H.R. 581 and S. 340, while the FSP Act is S. 369. Copies of these bills are available on the web at http://thomas.loc.gov/cgi-bin/bdquerytr/z?d109:HR00581:).