Federal Reporter’s Shield Law – Just Do It!

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As a former journalist and current media defense lawyer, I have relied on and been involved in numerous battles over the reporter's privilege. In 1991 while writing for *The University Daily Kansan* on the student senate beat, I pondered potential discovery of my (copious) notes as I covered the process leading to removal of the first African American student body president at the University of Kansas for breaches of the student code. Although my notes revealed nothing nefarious (other than a borderline OCD tendency to write everything down), I considered them my private business and felt entitled to reveal via publication only what I — and my editors — felt was newsworthy.

That belief was never challenged while I was a student reporter, but it has been challenged on numerous occasions against my legal clients. On those occasions, my clients have retained me, and we have *always* won in our assertion of the reporter's privilege. Although I would like to claim otherwise, this 100 percent batting average has little, if anything, to do with my legal skills. Rather, it is a result of prosecutorial laziness in failing to probe elsewhere before attempting to disgorge work product from the media.

Generally speaking, I admire prosecutors. I envy the fact that they regularly try cases. I respect the sacrifice they make in monetary compensation for the public good. And I aspire to elicit the same respect they receive from federal and state judges. In Chicago, we have numerous examples of admirable prosecutors, including former U.S. Attorney Patrick Fitzgerald. He worked wonders in the perennial battle against corruption in Chicago. But he also perhaps did more damage to recognition of a federal reporter's privilege than any other prosecutor since the beginning of time in pursuing journalistic work product from former *New York Times* reporter Judy Miller (in a classic case of bad facts making bad law).

The Wall Street Journal (as well as numerous other media outlets) reports today that the Obama administration is pressing Congress to revive federal reporter's shield legislation as a result of alleged prosecutorial abuse related to Associated Press phone records and investigation of national-security leaks. The shield law that has been bandied about for the past several years is not absolute. Instead, it is qualified and would merely require prosecutors to do a thorough job before forcing media entities to spend money lawyering up and fighting subpoenas.

In a day and age when the traditional media are struggling to survive and venerable entities such as the AP are spending millions of dollars battling news aggregators that threaten to destroy the traditional media

business model, it seems eminently reasonable that Congress would require prosecutors to do their homework before attempting to turn the media into their pro bono paralegal staff.

The time for a federal reporter's privilege is now. Congress should take advantage of the momentum established by the latest controversy and push this legislation through.

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