

The original documents are located in Box 26, folder “Shield Laws” of the Ron Nessen Papers at the Gerald R. Ford Presidential Library.

Copyright Notice

The copyright law of the United States (Title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material. Ron Nessen donated to the United States of America his copyrights in all of his unpublished writings in National Archives collections. Works prepared by U.S. Government employees as part of their official duties are in the public domain. The copyrights to materials written by other individuals or organizations are presumed to remain with them. If you think any of the information displayed in the PDF is subject to a valid copyright claim, please contact the Gerald R. Ford Presidential Library.

November 8, 1974

Option 1

Presidential Position on Newsmen's Privilege

The late Professor Alexander Bickel made a very lucid observation when he reminded us that constitutional confrontations are to be avoided, and that there must be forbearance on both sides.

That principle most certainly applies to the issue of newsmen's privilege or the so-called "shield laws."

There is little to be gained by either side when the issue of privileged information is escalated to a constitutional confrontation.

One great purpose of the First Amendment was to preserve the freedom of thought, opinion and belief all of which are essential to individual freedom and dignity. Moreover, the First Amendment is specific in establishing free speech and the right to publish so that ideas can be communicated without prior restraint.

I would, therefore, rather not see laws which limit or qualify the very essential, basic principles guarding the right of free speech and free thought.

The Fourth Estate is a vital part of the constitutional system of checks and balances in our government and the independence of the press is essential in order for it to perform its function. Over 150 years ago de Tocqueville wrote that, "The more I consider the independence of the press in its principal consequences, the more I am convinced that in the modern world it is the chief and, so to speak, the constitutive element of liberty."

Presidential Position on Newsmen's Privilege

The late Professor Alexander Bickel made a very lucid observation when he reminded us that constitutional confrontations are to be avoided, and that there must be forbearance on both sides.

That principle most certainly applies to the issue of newsmen's privilege or the so-called "shield laws." I believe that in those few cases in which information, developed by a newsman through a confidential relationship with a source or sources, which is considered vital to the prosecution of a criminal case, the use of negotiation between the newsman and the court is a much more viable approach than the issuance of a subpoena to obtain information.

There is little to be gained by either side when the issue of privileged information is escalated to a constitutional confrontation.

One great purpose of the First Amendment was to preserve freedom of thought, opinion and belief all of which are essential to individual freedom and dignity. Moreover, the First Amendment is specific in establishing free speech and the right to publish so that ideas can be communicated without prior restraint.

I would, therefore, rather not see laws which limit or qualify the very essential, basic principles guarding the right of free speech and free thought.

The Fourth Estate is a vital part of the constitutional system of checks and balances in our government and the independence of the press is essential in order for it to perform its function. Over 150 years ago de Tocqueville wrote that, "The more I consider the independence of the press in its principal consequences, the more I am convinced that in the modern world it is the chief and, so to speak, the constitutive element of liberty."

DRAFT

THE WHITE HOUSE

WASHINGTON

November 8, 1974

MEMORANDUM FOR: THE PRESIDENT

FROM: KEN COLE

SUBJECT: Newsman's Privilege (Shield Law)

In your meeting on Friday, October 25 in the Roosevelt Room with newspaper editors, you were asked your position on pending legislation to create a shield law for newsmen. Your response indicated that you felt the pending legislation was not at all likely to be reported out this session.

The last Congressional consideration of any shield law occurred in March 1974 before the full House Judiciary Committee, but there was so much opposition to the bill that no further attempt has been made to bring it up again. However, in light of the question you received from the newspaper editors and your pending appearance before Delta Sigma Chi in Arizona on November 14, we thought it advisable to provide you with several optionable responses to the newsman privilege question. Once you indicate your preference, the Q & A will be fleshed out.

I. Background

The Department of Justice has taken the position in testimony in the past that their Guidelines, issued in October of 1970, are working well and that legislation would be inappropriate unless the Guidelines prove unworkable. Among other things, the Guidelines provide that: (1) before a subpoena will be requested, sources independent of the press must indicate that a crime has been committed; (2) there must be reason to believe the evidence sought is essential to a successful investigation; and (3) the government must have attempted to acquire the information from non-press sources.

Governor Rockefeller testified in the 1973 Senate hearings in favor of New York's absolute shield law, and endorsed this position during his confirmation hearings in August.

II. Possible Responses

1. "I believe strongly in an aggressive and free press, and I think that newsmen should only be required to testify in the rarest of occasions-- but I am not at all sure that Federal legislation in this area will work to the long run advantage of the Fourth Estate. I would prefer to rely upon a vigorous defense of the First Amendment by the press."
2. "I have discussed the question of newsmen's privilege with the Attorney General, who has informed me that there have been no complaints with regard to the operation of the Justice Guidelines for subpoenaing newsmen which have been in effect for several years. If there develops a reasonable basis for such complaints, I will seriously consider endorsing legislation to protect newsmen."
3. "I believe in a vigorous and free press, and feel that some of the indications of government operation over the past several years indicate a further need to assure that freedom. I have, therefore, asked the Attorney General to work with the Congress toward the development of some qualified privilege to shield newsmen from government abuse."
4. "I know that Governor Rockefeller strongly supports the absolute shield law which is existent in New York State. I think each State should have the opportunity to enact its own legislation for the protection of newsmen and think that the flexibility provided by this use of our Federal system is far preferable to attempting to enact a single shield law at the Federal level which will affect all the States. I think before we intrude legislatively on the First Amendment, we need the experience which is being currently gained by State laws in this area."
5. "In order to best preserve the sanctity of a free and vigorous press I think there should be an absolute privilege protecting newsmen from being forced to reveal their confidential sources. I have, therefore, instructed the Attorney General to draft such legislation for transmittal to the Congress next Session."

MEMORANDUM

THE WHITE HOUSE
WASHINGTON

November 13, 1974

MEMORANDUM FOR: LOU THOMPSON
FROM: JERRY WARREN
SUBJECT: Shield Law

Any answer from the President on the Shield Law, after it restates the President's belief in a free press, should include the statistics supplied by the Justice Department: between August 1970 and March 9, 1974, 1974, subpoenas were authorized in 25 matters (13 grand jury, 12 trials) against 49 newsmen. One of these cases involved a subpoena of 20 newsmen where a public official argued for change of venue because of adverse publicity and testimony was sought from the newsmen as to coverage of the case. This shows that the guidelines have not resulted in wholesale harrassment of reporters. I think also we can point out, as the President has before, his strong position on wiretapping.

The President could note that he is aware that Sigma Delta Chi and the other major official journalism societies have come out in favor of a federal Shield Law but that he has been told there is division in the membership of these societies and that many in the profession have pointed out the danger of trying to regulate news gathering by federal law.

Another plus would be if the President could say that he has discussed this matter with the Attorney General and that as a result of that discussion the guidelines will be reviewed. Also that the President has informed the Attorney General that he alone must make the decision on any major case involving possible subpoena of a newsman and that in the most important cases, the President wants to review the circumstances himself.

THE WHITE HOUSE

WASHINGTON

TALKING PAPER

MEMORANDUM FOR: THE PRESIDENT

FROM: RON NESSEN

SUBJECT: Newsmen's Privilege Legislation
(Shield Law)

1. When you met on Friday, October 25, with the newspaper editors you were asked your position on pending legislation in the Congress to create a shield law for newsmen. In your response you indicated that you felt the pending legislation was not likely to be reported out this session.
2. The last time Congress considered a shield law was in March of this year before the full House Judiciary Committee. There was, however, so much opposition to the bill that there was no further attempt to bring it up again.
3. Further background:
 - a) The Justice Department, on October 10, 1970, issued Guidelines for Subpoenas to the News Media which call for restraint in the issuance of subpoenas against the news media and emphasized the use of negotiation to resolve conflicts. If negotiations fail, no subpoena could be issued without authorization of the Attorney General.
 - b) The Supreme Court ruled on June 29, 1972 in a 5 to 4 decision that newsmen do not have an absolute privilege under the First Amendment to refuse to divulge their confidential information or sources. (Branzburg vs. Hayes, 408 US 665 (1972)).

- c) As a result of the above Supreme Court decision, a number of bills on newsmen's privilege were introduced in the 93rd Congress -- 7 in the Senate and more than 50 in the House. These bills range from providing absolute privilege against disclosure of either sources or information to that which would provide absolute privilege at the investigative stage and qualified privilege at the trial stage.
 - d) The Justice Department, in testifying before the Congress on this legislation, has express two major concerns:
 - 1) an objection to absolute privilege for newsmen
 - 2) a statement of misgivings on the constitutional basis for application of federal legislation to newsmen's privilege questions in state courts.
 - e) Basically, the Justice Department's position is that their guidelines are working well and that federal legislation would be inappropriate unless the guidelines prove unworkable. The guidelines provide that 1) before the subpoena would be requested sources independent of press must indicate that a crime has been committed; 2) there must be reason to believe the evidence sought is essential to a successful investigation; and 3) the government must have attempted to acquire the information first from non-press sources.
 - f) Governor Rockefeller testified in the 1973 Senate hearings in favor of New York's absolute shield law and has endorsed this position during his August confirmation hearings.
 - g) Assistant Attorney General Robert Dixon indicated the belief that it was unwise for the Federal Government to interfere in state court proceedings, and it would also strain the Constitution if the Congress had authority to enact such legislation.
4. In light of the question you received from newspaper editors and your appearance this evening before the Sigma Delta Chi Convention I think it is advisable for you to review several options for response to questions you may receive on the issue of shield laws.

Option 1: The late Professor Alexander Bickel made a very lucid observation when he reminded us that constitutional confrontations are to be avoided and that there must be forbearance on both sides. That principle must certainly apply to the issue of newsmen's privilege or the so-called "shield laws." There is little to be gained by either side when the issue of privileged information is escalated to a constitutional confrontation. I feel that these matters should be resolved through negotiation short of a constitutional confrontation. I would prefer not to see federal laws which limit or qualify the very essential, basic principle granting the First Amendment right of free speech and free thought. The Fourth Estate is a vital part of our constitutional system of checks and balances and an aggressive and free press is essential in order for it to perform this function.

Option 2: I have discussed the question of newsmen's privilege with the Attorney General, who has informed me that there have been no complaints with regard to the operation of the Justice Guidelines for subpoenaing newsmen which have been in effect for several years. If there develops a reasonable basis for such complaints, I will seriously consider endorsing legislation to protect newsmen.

Option 3: I believe in a vigorous and free press, and feel that some of the indications of government operation over the past several years indicate a further need to assure that freedom. I have, therefore, asked the Attorney General to work with the Congress toward the development of some qualified privilege to shield newsmen from government abuse.

Option 4: I know that Governor Rockefeller strongly supports the absolute shield law which is existent in New York State. I think each State should have the opportunity to enact its own legislation for the protection of newsmen and think that the flexibility provided by this use of our Federal system is far preferable to attempting to enact a single shield law at the Federal level which will affect all the States. I think before we intrude legislatively on the First Amendment, we need the experience which is being currently gained by State laws in this area.

Option 5: In order to best preserve the sanctity of a free and vigorous press I think there should be an absolute privilege protecting newsmen from being forced to reveal their confidential sources. I have, therefore, instructed the Attorney General to draft such legislation for transmittal to the Congress next session.