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JAIL IS NEWSMAN'S

What Ever Happened to

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Author of the book "Death in the Mine" and associate of columnist Jack Anderson.

NEW NEMESIS

Freedom of the Press?

WASHINGTON.—

ISAAC KLEINERMAN, a CBS News producer, took a camera crew through the South recently to develop material for a documentary on the problems of children in America. He hoped to arrange an interview with a mother who could describe vividly how the welfare system, with its prohibitions against payments to familes with working fathers, has encouraged the breakup of homes.

He finally found just such a woman. She was a welfare client who spoke eloquently from experience of the system's inequities. She agreed to be interviewed on camera, but only with her face averted and with absolute assurances she would not be identified by name. She had been secretly harboring her husband in her home and feared this would be discovered if she spoke out publicly.

Although promises to withhold names have traditionally been routine in journalism, Kleinerman called CBS headquarters in New York to check. The matter was referred to the legal department where the judgment was swift. Kleinerman was told not to give the requested assurance. The interview was canceled.

CBS's lawyers were reacting to the Supreme Court's 5-to-4 decision last June 29, in the so-called Caldwell case, that the First Amendment gives journalists no right to conceal the identity of their sources of information from a grand jury. The court acted simultaneously in three cases of newsmen who had been subpenaed to appear before grand juries to expand upon information that was in their stories.

Two of the reporters, Earl Caldwell of The New York Times and Paul Pappas of WTEV-TV in New Bedford, Mass., had gained access to the inner workings of the Black Panther party. The other, Paul Branzburg of The Louisville Courier-Journal, had published an inside story on the drug trade which named no names. All three refused to identify their sources or to breach other confidences which they felt had made their reports possible in the first place.

Pappas and Branzburg were also ordered to testify by state courts and appealed to the Supreme Court. Caldwell was excused from testifying first by the Federal District Court in San Francisco and subsequently by the Ninth Circuit Court of Appeals, which ruled that even his appearance behind the closed doors of a grand jury room would damage his credibility with his Black Panther sources. The Government appealed his case to the Supreme Court.

SPEAKING FOR THE MAJORITY, Justice Byron R .White wrote, "We are asked . . . to grant newsmen a testimonial priviledge that other citizens do not enjoy. This we decline to do . . . We cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in prosecuting those crimes reported to the press by informants . . ."

Speaking for three of the four dissenters, Justice Potter Stewart argued that the Court "invites state and Federal authorities to undermine the historic inde-

pendence of the press by attempting to annex the journalistic profession as an investigative arm of Government .... when governmental officials possess an unchecked power to compel newsmen to disclose information received in confidence, sources will clearly be deterred from giving information, and reporters will clearly be deterred from publishing it because the uncertainty about the exercise of the power will lead to 'self-censorship.'"

Justice Stewart' prediction, of course, fits precisely the circumstances of the canceled CBS interview. And the chilling effect of the decision on the network does not seem to be an isolated example. For instance, Paul Branzburg, The Louisville Courier-Journal reporter whose case went to the Supreme Court, was also subpenaed by a second Kentucky grand jury in connection with another story.

At the height of the controversy, he learned that marijuana use had become widespread among well-to-do adults in one large Kentucky community. He gathered material for a story on it mainly through interviews with persons who used the drug. The Courier-Journal, understandably concerned that this might lead to conflict with still a third grand jury, decided not to use it.

Nicholas von Hoffman, the Washington Post columnist who has written often about radical political activity, says he has had a long-standing policy of trying to avoid being present during any activity the Government might want to investigate. "I always thought there was no way we could resist subpenas, even before the Caldwell case," he said.

Although there is no indication that the Government still wants the testimony it sought from Earl Caldwell, the long court battle has left him uneasy. "When the Government issued the subpenas," he says, "they asked for more than just my testimony. They wanted documents, tapes and notes. Since then, I have destroyed other tapes and notes and papers that I might have been able to use for stories. In some cases, I did taped interviews where I promised not to use the material until some future time. Now I've destroyed these kinds of things — things that might have been invaluable to me."

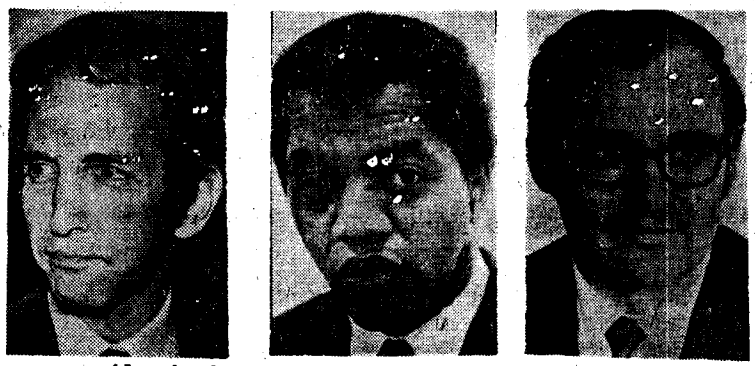
INTERESTINGLY, one who is not concerned about the impact of the Court's action is Joseph Alsop, the syndicated Washington columnist best known in recent years for his ardent support of American policy in Vietnam. Alsop's column has frequently contained sensitive military and diplomatic information, but it has usually supported the Government's position.

Asked about the Court ruling, Alsop said, "I can't imagine that it would ever affect me at all." He added, with obvious reference to the Pentagon Papers case and the publication of other classified documents by the press, "I'm sort of old-fashioned, and I set some limits that other people don't observe." Besides, he said, "There's no law that makes it illegal for an official to talk to a newsman."

It is reporters who cover activity frowned upon by the authorities or uncover facts embarrassing to them that seem likely to be hampered. For the sources of such information are now vulnerable to identification and punishment. It is impossible, of course, to measure exactly how reluctant such sources have become in the aftermath of the Supreme Court action. After all, reporters rarely find out about the stories they don't get.

Investigative journalists say they have

Brit Hume (above, right) author of the accompanying article, may himself face imprisonment for refusing to reveal his sources in a story involving the United Mine Workers. Hume's colleague, Jack Anderson (left), feels investigative journalists require "total protection of sources."



Also in free-press cases are (from left) Daniel Ellsberg, Earl Caldwell, Peter Bridge.

noticed changes since the decision. Jack Anderson, the muckraking columnist whose revelations have been so embarrassing to the Nixon Administration, says Government sources he has been dealing with for years have begun to ask cautious questions about the Caldwell case and to seek renewed assurances he would protect them.

Anderson is deeply troubled about the long-term effect of the decision. "Our kind of journalism," he says, "requires total protection of the sources or we go out of business. For the kind of stories we do, there are no press briefings, no press handouts. I have to rely on unauthorized sources to get secrets, mainly political secrets. You cannot get them from official sources. And you cannot allow the sources to take the risks. I have to take the risks and now the risks in doing this kind of reporting, which have always been high, have been multiplied."

By "taking the risks," Anderson means that if he is subpenaed and ordered to identify a source, he will refuse, whatever the consequences. His defiant attitude is shared by many, if not most, of his colleagues, who believe that the ability to keep confidences is indispensable to digging up news beyond what is officially sanctioned as fit for public consumption.

ALREADY, THERE HAVE BEEN some noteworthy collisions. Peter Bridge, a reporter for the now-defunct Newark News, was jailed recently for three weeks for contempt of court. He refused to answer a handful of grand jury questions that were related to a story he had written about official corruption but went beyond what he had actually published. Although he did not claim that a confidential source was involved, Bridge felt that the questions encroached upon his First Amendment freedom by forcing him to disclose information he had chosen not to divulge.

Although Bridge's case has been the most celebrated so far, his sentence was light compared to the six-month term given Paul Branzburg for his refusal to name the persons who gave him access to their hashish-making operation in Louisville. Branzburg has moved to Michigan, where he now works for the Detroit Free Press. If he returns to Kentucky to serve his sentence, he will also face contempt charges for refusing to cooperate with the second grand jury which has sought his testimony. Gov. Wendell Ford of Kentucky has now moved to extradite him from Michigan.

(The most recent development in the "free press" controversy occurred last week when John R. Lawrence, chief of the Los Angeles' Times Washington Bureau, was found in contempt of federal court and jailed briefly. Lawrence had refused to surrender tape recordings of an interview with a principal witness in the so-called Watergate Case involving the alleged bugging of the Democratic Party's headquarters. Later in the week, however, the Times turned the tapes over to the U. S. District Court in Washington so that portions of them could be used by the defense in the bugging case. The Times had at first contended that the taped information was protected by the First Amendment's guarantee of a free press.)

In his majority opinion in the Caldwell case, Justice White asserts that grand jury investigative powers "are necessarily broad." He speaks of the "ancient role of the grand jury, which has the dual function of determining if there is probable cause to believe that a crime has been committed and protecting citizens against unfounded criminal prosecutions." These doctrines are basic to the Court's ruling, but they are equally basic to the apprehensions of journalists about grand juries. The "necessarily broad" investigative powers cited by Justice White enable grand juries to use their subpena power to delve into whtaever they please.

Justice White is certainly correct in saying that grand juries are intended to protect citizens "against unfounded criminal prosecutions." But the idea that the grand jury today actually functions as a vigilant citizens review board, preventing prosecuting attorneys from abusing their authority, strikes many journalists as a bit fanciful. As even most prosecutors will acknowledge, grand juries today willingly head in whatever direction prosecutors choose to steer them. And since most prosecutors are either elected officials or political appointees, politics is often a factor in grand jury investigations.

With the broad charter granted them, grand juries can easily conduct investigations for the sole, if unstated, purpose of identifying the sources of embarrassing news stories. As the Government brief in the Caldwell case put it, a grand jury "need establish no factual basis for commencing an investigation and can pursue rumors which further investigation may prove groundless."

AN EMPLOYE named Gene Smith learned the truth of this the hard way when he was hauled before a Federal grand jury in Norfolk, Va., last year, under suspicion of having violated a vague and obscure law prohibiting "aural acquisition" of conversations. The

investigation stemmed from a Jack Anderson column that reported in great detail how Pentagon officials had laughed, sung and told dirty jokes while making up the list of persons to be fired at Christmas time in 1970. When the Defense Department denied the story, Anderson offered to produce a tape of the meeting.

The FBI was called in, and Smith was identified as the prime suspect in taping the meeting. He was grilled mercilessly by military investigators. The FBI visited his neighbors to ask about his drinking habits, his loyalty, his relatives and associates. Before the grand jury, however, Smith denied under oath that he even knew Jack Anderson. U. S. Attorney Brian Gettings acknowledged afterward to Anderson associate Les Whitten that "we probably do have the wrong man." They did.

Justice Byron R. White, who spoke for Supreme Court majority in ruling that journalists can't conceal sources from grand juries.

Subsequently, Anderson cited alleged instances in which Smith's Pentagon superiors had listened in on employes' phone calls and tape-recorded staff meetings without prior warning. He challenged the grand jury to investigate these cases. But once the attempt to learn the source of Anderson's column was over, Gettings and his grand jury lost interest in "aural acquisition."

The best-known news source to received grand jury attention, of course, is Daniel Ellsberg, whose release of the Pentagon Papers precipitated one of the major collisions between press and Government in American history. The conflict did not end with the Supreme Court's ruling that the Government could not prevent the publication of the secret Vietnam war study. The Government took the matter before a grand jury, which apparently had no difficulty accepting the novel interpretations of several laws under which the Government sought to prosecute Ellsberg and an associate, Anthony Russo, for making classified documents available. The pair were indicted and were about to come to trial when this article went to press.

Also still open is the question of whether a plaintiff in a libel suit is entitled to discover a newsman's sources. In a series of major decisions, beginning with the celebrated New York Times v. Sullivan case in 1964, the Supreme Court has made it extremely difficult for anyone mentioned in a news story to successfully sue for libel.

The Court has ruled, in effect, that no matter how false or damaging a report may be, a newsworthy person may not collect libel damages unless he can show that it was published with the knowledge that it was false or in reckless disregard of the truth. The idea behind these decisions is that, under the First Amendment, journalists pursuing even the most damaging kind of information should be free from fear of a ruinous libel judgment caused by an honest mistake.

These decisions, of course, impose a heavy burden of proof on anyone suing a newsman for libel. The weight of this burden has led Federal Judge Howard Corcoran in Washington to order me to name the inside sources of part of a one-paragraph story I reported for Jack Anderson's column.

The story raised some questions about a reported burglary at the headquarters of the United Mine Workers. UMW general counsel Edward Carey, who filed the burglary report, sued me, Anderson and The Washington Post, which carried the column, for a total of $9 million. The UMW, of course, has been the center of one of the major labor scandals of the century. Its president W. A. (Tony) Boyle, has been sentenced to five years in jail for misuse of union funds. The man who challenged him for re-election in 1969, Joseph Yablonski, was murdered in his bedroom, along with his wife and daughter, weeks after the election. One minor union official has already pleaded guilty in the killings, and a top union officer, a member of the executive board of the union's international, Albert Pass, is presently awaiting trial.

It is hard to imagine circumstances under which my determination to protect my sources would be greater. But if Corcoran's order is allowed to stand, I might face imprisonment for contempt of court or a default judgment or both, for refusing to reveal them. What's more, allowing public figures to gain access to reporter's sources by sheer virtue of filing a libel suit could encourage a wave of such suits for just that purpose.

THE CALDWELL DECISION has led to the introduction of more than 20 bills in Congress to enable newsmen to protect their sources. They range from a brief bill advocated by Sen. Alan Cranston of California, giving newsmen an absolute privilege to keep confidences, to a variety of other bills granting a qualified privilege.

The chances of any such bill being enacted, however, are dimmed by the opposition of the Nixon Administration. In testimony before a House Judiciary subcommittee, Roger Cramton, a Justice Department witness, argued that newsmen are adequately protected by a set of guidelines for press subpenas issued by the Attorney General after the controversy over the Caldwell case erupted two years ago.

The guidelines require basically that subpenas for newsmen's testimony be issued only when the information cannot be obtained by other means and is essential to a successful investigation of a serious crime. Of course, these restrictions are not law, and may be ignored or revoked at the pleasure of the Attorney General. What's more, they are binding only on federal prosecutors and have no effect on subpenas at the state level.

The only kind of legislation that seems to have a chance of passage is a qualified newsman's immunity law. But there is considerable reason to doubt whether anything besides the absolute protection advocated by Sen. Cranston would resolve the conflict. For there are qualified newsmen's-immunity laws in Kentucky, where Paul Branzburg faces jail, in California, where William Farr has been sentenced, and in New Jersey, where Peter Bridge has already been in jail. In all three cases, the courts held that the laws didn't apply.

Although a recent Gallup poll showed public sentiment in favor of protection for newsmen's sources by a margin of 57 to 34 percent, there is no sign that the public is much aroused about the issue. Public hostility toward the news media is high, as the widely favorable reaction to Vice President Agnew's attacks have shown.

Although the press won the court fight over publication of the Pentagon Papers, many citizens were left wondering whether the press should have the right to overrule the decisions of duly elected and appointed officials who have chosen to classify information. Similar questions undoubtedly occur to those who have followed the press subpoena controversy. Why should newsmen be allowed to with-

hold information which public prosecutors say they need to conduct official criminal investigations?

ONE ANSWER, OF COURSE, is that the press has a responsibility to investigate crime. Indeed, the Supreme Court in the past has recognized the duty of the press to explore both. In a decision 41 years ago overruling the shutdown of a newspaper in Minnesota, Chief Justice Charles Evans Hughes wrote " . . . the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press . . . "

The Chief Justice's words fit the circumstances of today even more than those of 1931. But the kind of "vigilant and courageous" reporting of which he speaks is the most difficult kind of all. It is virtually impossible without the cooperation of inside sources—cooperation which depends upon the newsman's ability to protect the source. Such protection may mean keeping the source's identity secret, or it may mean withholding part of the information furnished by the source in order to get other information. Whatever the arrangement, the reporter must abide by it, or he loses his sources.

If the press has a strong case for a law to protect its sources, it does not seem that it has made the case forcefully to the public. Unless this is done, the chances of getting worthwhile legislation in this area will remain slim.

Barring Congressional enactment of a bill like Sen. Cranston's, or an unexpected reversal of field by the Supreme Court, there seems to be little likelihood that the conflict over the limits of journalistic freedom will soon die down.