Hill to Start Newsmen Privilege Effort

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On June 11, 1722, the New England Courant gave high offense to the Royal Council for suggesting that the authorities were being somewhat sluggish in suppressing piracy off the Massachusetts coast.

The owner of the paper, James Franklin, was summoned for questioning and sent to jail for a month after refusing to name the author of the impertinent paragraph.

Next to be called was his half-brother and indentured apprentice, 15-year-old Benjamin Franklin, who parried the inquiries more successfully. The council let him go, he wrote later in his autobiography, "considering me, perhaps, as an apprentice who was bound to keep his master's secrets."

Young Ben Franklin might not be so lucky today. The privilege accorded him in 1722, if it can be called that, established no precedent for journalists. Like James Franklin, newsmen are once again beginning to go to jail for refusing to tell courts, grand juries and legislative committees what they want to know.

The question these days is not of authorship, but of confidential sources; not so much of what newsmen put into print, but of what they hold out. Increasingly they have been contending that forcing them to disclose such information would deprive them of informants and throttle the free flow of news guaranteed implicitly by the First Amendment.

So far, the authorities have been winning the argument, if not the secrets. In a 5-to-4 decision last June involving three newsmen subpoenaed before grand juries, the Supreme Court ruled that the First Amendment's guarantee of a free press did not entitle them to refuse to reveal information gained in confidence.

A major counterattack is building up in Congress where 91 members of the House and 17 senators at last count have introduced or cosponsored various bills to grant newsmen a statutory privilege against compulsory testimony.

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PRIVILEGE, From A1

Hearings begin today before a House Judiciary subcommittee headed by Rep. Robert W. Kastenmeier (D-Wis.) and on Feb. 20 Before the Senate Subcommittee on constitutional rights under Sen. Sam J. Ervin Jr. (D-N. C.). Both favor some sort of Newsman's "shield law," as the proposals have come to be called.

Some of the impetus comes from growing complaints of White House news management during the past decade and rising resentment among congressmen over their own unsuccessful confrontations with the Executive Branch as well as the courts.

"The longer I'm up here, the more I'm convinced that the more important news is leaked," says Sen. Walter F. Mondale (D-Minn.). "Politicians and government just don't put out bad news about themselves. Most of the information I operate on is information that somebody leaked."

In many cases, says Ervin, "if sources of information cannot be assured of anonymity, chances are they will not come forward. It is rather ironic, I think, that the reporters themselves are the ones who ultimately are jailed for refusal to reveal sources of stories which the public would never have been aware of, had not the reporter himself decided to publish."

Since the Supreme Court decision, at least four newsmen have been locked up for refusing to produce testimony or notes in response to court orders and grand jury subpoenas—a development that Kastenmeier calls "of particular concern to those of us who view the free press as the very touchstone of a free and democratic society."

Although the jailings were the result of state actions in three cases and a defense counsel's move in the only federal case involved, Kastenmeier feels that Supreme Court's decision created the climate.

"I grant you can't prove it," he said. "But statistically, we haven't had that many cases. Then, all of a sudden, three or four of them."

In the Justice Department's view, it is a dispute by now of more sound than substance. Assistant Attorney General Roger C. Cramton, the department's spokesman on the issue, maintains that the press has already won the battle simply by making so much noise about it.

"A prosecutor today has virtually got to be out of his mind to threaten to get a subpoena from a newsman, especially if he's elected," Cramton asserted in a telephone interview. "The media attention has grown since 1970 to the point where now you don't get your manhood as a journalist until you get a threat to go to jail. I think newsmen are going to get away with bloody murder now."

As Cramton suggested, the dispute arose some three years ago with a growing number of federal grand jury subpoenas. Time, Life and Newsweek magazines were presented with demands for their unedited files and photographs concerning Students for a Democratic Society and the militant Weatherman faction. Chicago's four major newspapers were ordered to produce files, photographs and reporters' notes about the violence during the 1968 Democratic National Convention. Earl Caldwell, a San Francisco correspondent for the New York Times, was ordered to appear along with his notes and taped interviews with members of the Black Panther Party about the aims, purposes and activities of that organization.

The habit spread. At one point, The Cleveland Plain Dealer was served with seven subpoenas in a single week. NBC and CBS, and their wholly owned stations, counted a total of 123 subpoenas between January of

1969 and June of 1971.

Charges of harassment from major newsgathering organizations and the American Society of Newspaper Editors prompted the federal government to step back first. On Aug. 10, 1970, then-Attorney General John N. Mitchell announced that no more contested press subpoenas would be issued without his personal approval. At the same time, he issued guidelines calling on federal prosecutors to try to get information they need from "non-press" sources.

In promulgating them, Mitchell said he was struck by the intensity of press reaction. Calling the controversy "one of the most difficult problems I have faced as Attorney General," he reported, apparently with some surprise, being told by "serious journalists from all the media . . . that they will go to prison rather than comply with subpoenas; that they will destroy their notebooks and burn their film rather than permit them to be used in judicial proceeding."

Those in the news business are far from unanimous about the need or desirability of a statutory privilege, but they do feel strongly about keeping a confidence. In a 292-page study for the Reporters' Committee on Freedon of the Press, University of Michigan Law Professor Vince Blasi said that of 975 reporters surveyed, 68.4 per cent said they would be willing to go to jail for as much as six months to protect sources they felt should be privileged. At the same time, almost half of the reporters surveyed said that under certain circumstances, they would voluntarily give grand jury testimony that might incriminate valuable sources even if they had an absolute privilege against forced testimony.

"The prevalent attitude of newsmen concerning the subpoena issue," Blasi found is not that of indifference to their civic obligations—far from it—but rather a vehement belief that the journalism profession, not the legal profession, should resolve these questions of conflicting ethical obligations to sources and to society."

The Supreme Court majority frowned sharply on that notion, even in allowing in its June 29 decision that Congress was perfectly free to fashion a statutory newsman's privilege "as narrow or broad as deemed necessary." The ruling was a consolidation of three cases on appeal, including a favorable appellate court decision for Times reporter Caldwell. With Justice Lewis F. Powell concurring, less enthusiastically it seemed, in a separate opinion, the majority reversed Caldwell's short-lived victory and held to the old dictum that the public has a right to every man's evidence.

Conceding that the identity of police as distinct from press, informers is often privileged, Justice Byron White, writing for the majority, emphasized that even "this system is not impervious to control by the judiciary and the decision to whether to unmask an informer or to continue to profit by his anonymity is in public, not private, hands. We think it should remain there. . . ."

"The task of judges, like other officials outside the legislative branch," White wrote at another point, "is not to make the law, but to uphold it in accordance with their oaths."

When it comes to testimonial privileges, however, public control often seems to boil down to judicial control, state statutes not withstanding. With Maryland leading the way back in 1896, 19 state legislatures including Kentucky and California have adopted some sort of shield law for newsmen.

One of the cases in the Supreme Court's June 29 decision involved Paul Branzburg, who wrote a 1969 story for The Louisville (Ky.) Courier-Journal which detailed the activities of two hashish makers whom he promised not to identify. Called before the Jefferson County (Ky.) grand jury, he refused to name the pair, invoking the state law stating that "no person shall be compelled to disclose in any legal proceeding . . . the source of any information procured or obtained by him and published in a newspaper . . . by which he is engaged . . ."

The state courts, and ultimately the U.S. Supreme Court, held that the law protected the identity of informants but not events that Branzburg observed personally nor "the identities of those persons he had observed." Now working for the Detroit Free Press, Branzburg faces a six-month contempt sentence in Kentucky. State authorities are seeking his extradition from Michigan.

In California, reporter William Farr, 38, thought he, too, could rely on state law. Covering the Charles Manson murder trial for The Los Angeles Herald-Examiner in 1970, he burst into print with a banner-headlined, copyrighted story reporting lurid details of the Manson "family's" alleged plans to murder Hollywood stars after "ghastly tortures."

Despite presiding Judge Charles H. Older's "fair trial" or "gag" rule for witnesses and attorneys in the case, two of the six lawyers had given Farr a transcript of one witness's statement to police. Alerted before the story ran, the judge asked him who his sources were, but he relied on the state's news shield law protecting him from contempt for "refusing to disclose the source of any information procured for publication and published in a newspaper."

Farr subsequently left the Hearld-Examiner in 1971 for a short-lived job in the Los Angeles district attorney's office before moving to The Los Angeles Times. Ruling that he was not protected in the non-news job, Judge Older directed him to disclose his sources and ordered him to jail until he does. A California appellate court passed over the question of Farr's evaporating privilege, but upheld Judge Older's action on broader grounds.

The three-member court of appeals dismissed the shield law itself as "an unconstitutional interference by the legislative branch with an inherent and vital power of the court to control its own proceedings and officers."

Jailed last November after the U.S. Supreme Court refused to review his case, Farr served 45 days before his temporary release last month in connection with a bid for a writ of habeas corpus.

What might happen to a

congressional shield law for newsmen when it hits the courts can only be guessed at. The more immediate question is whether one will even be passed. The bills in the hopper offer a dizzy series of choices.

Some would apply to both federal and state proceedings. Some propose a qualified privilege, subject to being set aside by the courts under certain conditions. Some propose an "absolute" privilege before grand juries and legislative committees, but only a conditional privilege against trial testimony. Some would force newsmen to testify only in libel suits.

The strongest proposal comes from Sen. Alan Cranston (D-Calif.), a former correspondent for the old International News Service who covered European capitals in the 1930s. His bill, a tightened version of an American Newspaper Publishers Association draft, would prohibit "any federal or state proceeding" from compelling newsmen to disclose their sources or any information they do not use. He is thinking of making the bill still stronger by requiring that even published information need not be confirmed under oath if that would "impair" confidential relationships. (In his case, Earl Caldwell argued, successfully at one point, that just his appearing before a grand jury in secret would cut him off from the Black Panthers.)

Cranston sees little merit in the argument "that the 'citizen's duty to testify' must override free press considerations." He cites the privilege already granted in some states to professionals such as lawyers, doctors and priests, and the rule preventing spouses from being forced to testify against one another.

Most agree, however, that a qualified privilege for newsmen seems more likely even while press organizations such as Sigma Delta Chi and the ASNE are beginning to back an obsolute bill. Sen. Ervin, who disapproves of Congress legislating for the states, cautions that "there might be such disagreement on the terms" that all the proposals will falter.

Still another problem is the need for any privilege bill to define "newsman," a step that Prof. Blasi contends could ultimately lead to a certification procedure similar to that in other professions but hardly consonant with the First Amendment.

For the moment, there seems to be more optimism among House proponents, perhaps because the chairman of the House Judiciary Committee, Rep. Petter Rodino (D-N.J.), strongly favors a shield law. Subcommittee chairman Kastenmeier thinks the mood of Congress feisty enough at this point even to pass a newsman's bill over a possible veto.

"Not very Americans may be interested in the question," he said, "but politicians are. They can appreciate the anxiety produced by certain moves by the Executive in recent years, especially under Mr. Nixon and Mr. Agnew."

In its decision, the Supreme Court majority did explicitly acknowledge, for the first time in history, that "news gathering is not without its First Amendment protections." It said that "official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification."

For its part, the Justice Department, whose attitude toward a qualified newsman's privilege has been described as one of "passive resistance," reported, in a compilation for Kastenmeier's subcommittee, only "13 situations" involving the issuance of press subpoenas since the 1970 guidelines went into effect. The actual number of subpoenas, which was higher, was not specified.

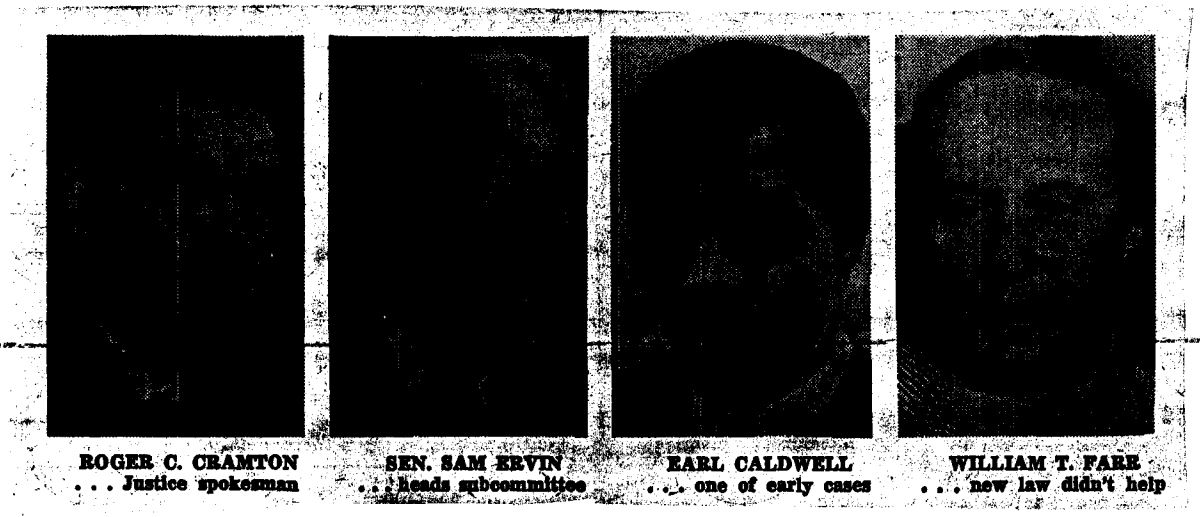
Even so, congressional critics of the Supreme Court decision—and of adminstration press policies—profess skepticism at all the suggestions that the flow of news remains as robust as ever. As for the high court's Caldwell-Branzburg decision, Ervin says:

"Judges ought to have wisdom as well as knowledge. I can recall defending a man who was running a big moonshine still right in his house. And I pleaded him guilty.

"Then the prosecutor, who got his pay from fees for each conviction, asked him where he got his still, figuring he might get some more cases. The man said, 'I ain't gwine tell ya.'

"The prosecutor asked the judge to make him answer. But the judge said, 'This man is indicating to me he has a code of ethics. It may not be as good as some others. But it would do injury to his conscience to make him answer. Motion denied.'"

Concluded Ervin: "That judge had wisdom."



ROGER C. CRAMTON
. . . Justice spokesman

SEN. SAM ERVIN
. . . heads subcommittee

EARL CALDWELL
. . . one of early cases

WILLIAM T. FARR
. . . new law didn't help