

# Last Stand for the First

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## Crusade Against the Press Perils

# Amendment

## Vital Freedoms

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**A** PRESS-GOVERNMENT confrontation, a good, sound have-at-each-other, is hardly new in the United States. There must have been a President sometime, even a borough President, who never denounced the press and felt brotherly toward it, but his name does not come to mind.

But there is now a direct engagement between press and Government — but not just between press and Government — taking place in this country, day in and day out, with increasing intensity, that does involve something new and touches the meaning, nature and balance of our society.

What is new is that the executive branch of Government for the first time has been using the courts, as an ally, a weapon and lever against the press to try to prevent it from performing its duties.

What is also quite important is that the Government has been able to win support or acquiescence of a good part of the public in its totally determined crusade against the press. At least two things have brought this about.

One is the failure of the press, largely through an overdose of timid self-consciousness, to present plainly a struggle in which it finds itself embroiled. Most old journalists are quite shy about situations affecting them—"stay out of the story"—and hideously embarrassed



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about speaking up for themselves for fear of being accused of conflict of interest.

The other is the skill of the Government and its spokesmen in presenting the issues they see as important diverting attention from the others. As the Government presents the case, the issues are these:

—The press is often biased and inaccurate and therefore has lost its credibility.

—The press resents criticism and considers itself immune to it.

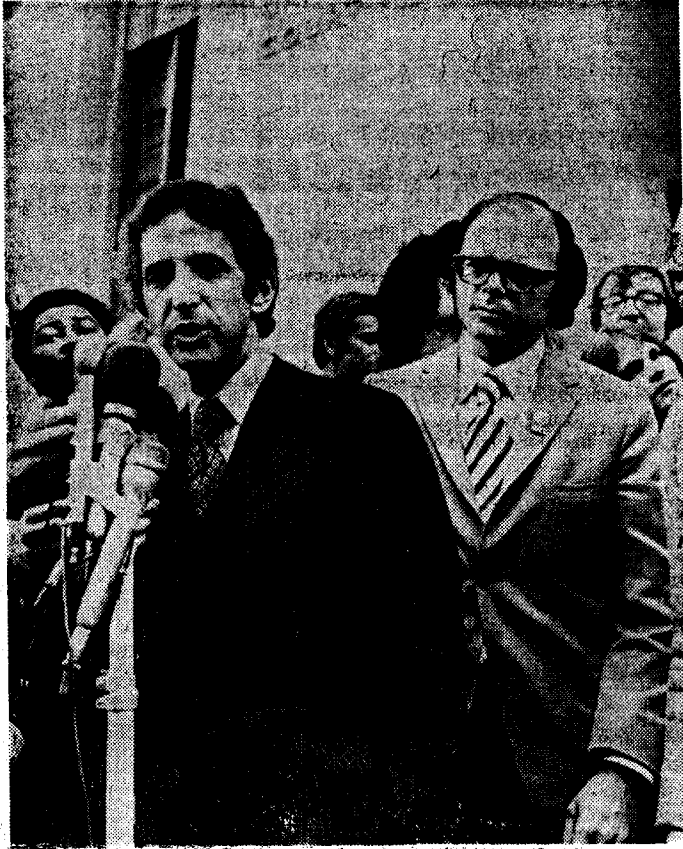
—The press is demanding a special privilege of confidentiality of sources that it often denies others and that can obstruct justice and hamper the chosen representatives of the people in carrying out their responsibilities.

It's we and they—the Government acting for the people on one side and the press, alone, on the other.

All of these charges often are lumped together—but it is important to separate them and examine them individually. Because one is a matter of opinion—credibility. Another is a matter of fact—immunity from criticism. And the most important—confidentiality—is a matter of law, the Constitution and the philosophy and administration of government.

So far—so far—even the most acid of official critics of the printed press have not suggested that the issue of press credibility is one that can be determined by court verdict, administrative fiat or standardization.

**P**RESS CREDIBILITY is a matter of conscience and judgment and there is no point ducking that reality—the conscience of the members of the press, the judgment of the public and of history. I'm quite sure that even Mr. Agnew would agree that any attempt to



*Daniel Ellsberg (left) and co-defendant Anthony Russo, who are currently on trial in the Pentagon Papers case, talk with newsmen outside the courthouse in Los Angeles.*

establish norms of credibility could only be made through the destruction of any semblance of the free press.

It could only be made by devising and imposing governmental standards as to what is fair and not fair, what is true and not true, what is objective and what is not, what is careful and what is slipshod. Many modern leaders, from Lenin to Marcos of the Philippines, have decided that standardization of credibility is indeed a handy way to get a little peace and quiet and makes for a delightful simplicity in government.

Even in our own society we have this in important part. We have the phenomenon of civil servants and politically appointed officials telling television and radio, two of the most important news distributors, what's fair and what's not fair, and using the whip of licensing renewal to enforce conformity with Government news standards. My own belief

is that this is unconstitutional, and it is sad to see the printed press being so bland about the growing incursion into the freedom of the electronic press and never seeming to hear that tolling bell.

But so far nobody in Government has proposed legal standardization of the printed press. So whether or not the press deserves credibility is a matter of opinion, and the last time I looked we were still free to have opinions about this.

Certainly the press is in trouble with the public. I don't need any polls to tell me that; all I need is a watch. Every time I walk into a party I look at my watch to see how long it will be before somebody starts slamming the press. Average time: 2 minutes, 42 seconds.

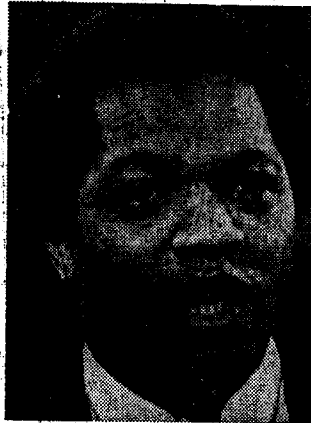
But after the guests have finished roughing up the press, they go after the universities, the kids, the military, the mayor, the President, the Congress, the Supreme Court, the church. Even the American Indians are getting their lumps at parties these days.

That's the point. This is the Iconoclastic Age. The performance of every single institution in American life is being re-examined as never before, and although it does lead to a certain paranoia and although too many normally intelligent people see conspiracies everywhere and nobody seems to trust anybody's motives anymore, all told it's not too bad an age in which to live.

The issues of press credibility can be answered at least in part by a question. Take any important reality—Vietnam, corruption, crime, governmental and business ethics, race, feminism—and ask whether what the public really knows came from the decisions of officialdom to reveal it or the daily attempts of the press to go beyond officialdom. Ask whether the public learns more from Ronald Ziegler or any first-rate Washington correspondent, and you face the key issue of credibility.

**T**HE GOVERNMENT'S COMPLAINT that the press considers itself immune to criticism is a faintly comical issue and I believe the Government knows it. There is no other institution in American life as deliberately open to criticism as the press. With almost a

**"It is not simply an issue between Government and the press. It is also an issue between the Government and the public. The question to be determined is whether the press can function in its role as a conveyor of meaningful information to the public."**



***Supreme Court ruling in the case of Earl Caldwell (above) precipitated the debate over peril to press freedom.***

masochistic fervor it prints columns of attacks upon itself by its opponents. Many of us correct our errors in public when we find them and since our existence depends on belief in our good faith, the press is in constant communication with—almost constant pursuit of—every group in the community. We talk a lot but we sure do listen a lot.

What other institution in American life opens itself to criticism as does the press?

Not only is Mr. Agnew free to criticize the press but the press is almost frantically eager to record his latest kick in the pants. But the Vice President and his colleagues in Government are not critics of the press at all.

They are critics of those stories or journals or writers not entirely to their taste. They make sweeping, rabble-rous-

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ing charges and seek to arouse not critical examination but anger and hatred. When Clay Whitehead, the White House's current anti-press fright-mask, was asked for example to back up his charges that network television was guilty of passing on "elitist gossip" and "ideological plugola," he demurely refused to get involved in specifics. He considered it proper to slander newscasters but not to provide evidence. Press criticism is one thing and demagoguery another, but the public dignifies the latter by considering it the former.

There is indeed an issue of credibility, and it is painful to say that it is really an issue of Government credibility. We have come to the point, sorrowfully, where we really do not expect our Governments to tell the whole truth or even a goodly part of it, whether it be about My Lai, Watergate, the Paris peace talks, military overruns or who told General Lavelle to do what. We have come to the point where we expect, if not outright falsehood, then at least obscurity, double-talk, cover-up and euphemistic jargon from American officialdom. We have to remind ourselves that this time a government branch may be telling the whole truth, and how sad that is.

Nor does a free press necessarily depend on total public admiration. Sometimes the press is ahead of the public—like those Southern reporters and editors who saw the race issue before their own communities were ready to face it and the correspondents who forced the public to recognize what was taking place in Vietnam. Sometimes it is behind the public, and just about every day it prints things that gets readers mad. Always has, always will.

It is not simply the Administration in Washington that uses demagoguery against the press. The attacks from the left and the so-called revolutionary movement are quite as constant, quite as distorted, quite as politically motivated. If they can't control the "establishment press," they can at least try to damage its reputation.

**B**UT THE MAINTENANCE of any kind of freedom does depend on conditions for exercising that freedom and on recognizing the signals that they are endangered. If the conditions for exercising freedom do not exist, constitutional guarantees become a mockery of reality. In case anybody has any doubts about this, let him read the constitutional provisions guaranteeing various freedoms in Communist societies. They read just fine.

Freedom of the press depends on a reasonable degree of access to information and on confidentiality of news sources, and they go together. Without them you have only freedom to print

speeches and handouts and that's not a freedom worth talking about.

Both access and confidentiality are now being threatened, and that is the basic issue as newspapermen and newspaperwomen see it. It is not an issue simply between Government and the press. It is also an issue between the Government and the public. The question to be determined is whether the press can function in its role as a conveyor of meaningful information to the public.

Access is being threatened by an ob-

sessiveness in Government about secrecy to a degree unknown in our history. And access is also being threatened by a series of court decisions tending to destroy a reporter's ability to keep confidential his confidential sources and confidential information. As the result of the Caldwell decision in the Supreme Court, at least four reporters already have gone to jail on the confidentiality issue, others face that prospect and there is serious question as to whether the press will be able to function as it has in the past, not simply in the investigation of wrongdoing but in inquiry into Government process.

Obviously, the concern is not about access to what the Government wants to tell the public. No problem about that—the press not only has access to that but the Government has instant, nationwide access to the public to let its position be known. What this is all about is information the Government would prefer not to become public at a particular moment—or at all—for a variety of reasons. The Government may believe the information might damage its negotiations at a given point. Or it may be that the Government simply feels that information would put it in a bad light and Governments are not keen on showing themselves in bad lights.

There are often real conflicts involved and Governmental interests are not always merely self-protective. Few people would dispute the right of a Government to try as best it can to keep certain things secret—military movements, ongoing intelligence operations in the field and some of the confidences of other Governments, for instance.

But the meaning of the First Amendment is that Government's judgments—including judgments about what should be made public—can be contested by the exercise of a free press. So we get down



*Rep. Robert W. Kastenmeier (D., Wis.), whose House Judiciary subcommittee began hearings last week on First Amendment issues.*

to those most difficult but most important elements in society—attitude and judgment—attitude and judgment of Government, of the press, of the public.

The assumption of most Americans would be that it is the obligation of Government to keep as few things secret as possible and for as short a length of time. Then honest people might argue about whether this piece of information or that should have been published—in living rooms, not courtrooms.

An editor is often asked, "But who elected you to decide that your judgment is better than that of the Secretary of State?" The answer that seemed so simple when the Constitution was written now seems rather difficult for many people to swallow.

The same Constitution that "elected" the President gave the press the right to examine his actions and contest his judgments and those of his servants. I believe also that the constitutional rights also imposed an ethical obligation on the press to use the right decently and in the public interest but it very carefully and purposefully did not set standards for either decency or public interest.

**I**N ANY CASE, that is not the heart issue. Instead of keeping as little secret for as short a time as possible, our recent Governments have adopted an attitude of keeping as much as possible secret for as long as possible. It is not just secrecy that is the issue but the attitude toward it. Secrecy has become something not to be avoided whenever possible—and that strikes me as a violation of the trust imposed in Government by the people.

The simplest way to keep things secret is to mark them secret and then lock them away and impose punishment upon any who reveal them to the public. There are thousands of people in all branches of Government authorized to lock whatever they wish away from the public, and millions of documents lie hidden, some of them decades old.

The fuss about the Pentagon Papers theoretically inspired the Government to take a new and more lenient look at its classification system. It may be new, but the leniency is hard to discern. An important part of post-World War II history

is still locked up, even though the participants may be dead or out of power. Keeping them hidden serves only the convenience or prestige of governments in general.

The whole classification policy is designed at least as much to keep information from the American public as from potential enemies and this has been acknowledged by many Government officials, past and present.

Most Americans, I assume, would agree that it is wrong and dangerous for our Governments to conceal historic information, although recent Governments — not just Mr. Nixon's — have been doing exactly that. That's the easy part to agree with.

But what about ongoing matters, really current matters? Are we to say that it's

OK to tell Americans what happened 15 years ago that might have led to a prolonged war but not exactly why the war was prolonged after "peace at hand"? Myself, I would a lot rather know what may affect the country today and tomorrow than what was significant yesterday and last year.

Here, too, an obsessiveness about secrecy has built up through several recent Administrations. It has become a way of life, an end in itself, a virtue. And like all obsessions, it sometimes so seizes its victims that they do not even know they are suffering from it.

The Pentagon Papers. More than anything else, they showed how deeply secrecy had become a pattern of living in our Government, simply accepted as an

assumption as so many other assumptions were accepted.

The Papers show clearly that one Administration after another carried itself and the country into a constantly escalating series of wars. A political war against the Geneva accords of 1954, a counter-insurgency war, a land war, an air war, a mass land war, the greatest bombing war in history. And the Pentagon papers show that each step was taken because the Government knew the preceding step had failed. Yet the public never knew that each step had failed.

But the papers show no indication at all that the various Governments of the United States ever even seriously considered telling the public the full truth, not even as an academic matter. If the Governments of the day had been more open, is it not at least conceivable that history might have changed, that public attitudes, fears and desires might have legitimately been taken into account and policy therefore modified?

policy decisions involved

**W**E HAVE NOW a Government that did not invent secrecy as a way of life but has happily adopted and built upon it. It has used the power of subpoena to try to force newsmen to reveal their sources of confidential information, an attempt to damage the press by making it serve as an investigative arm of Government. It has wrapped the entire diplomatic process up in the executive privilege by making a Presidential assistant rather than the Secretary of State responsible, thus cutting off the investigations of the Congress.

At the very least, the price of Government secrecy in some matters should be credibility and openness in most.

It is precisely because of the secrecy mania, precisely because so much is hidden or obscured, that the press must be even more determined than ever.

I do not believe every scrap of foreign-policy information must be printed. I do believe that it is the obligation of the press to inquire as deeply and broadly as possible, to print what it considers rele-

vant information, to give the citizen a clear idea of what is taking place.

That is why the whole question of confidentiality of news sources, always fundamental to a free press, becomes even more important. If a Government operates in an atmosphere of secrecy, pertinent information must come from those willing to risk the Government's wrath.

The greater the secrecy, the greater the risk and the greater the importance of the confidential source. This is quite different from the authorized, anonymous, highly placed source Government or officials use when they want information leaked without attribution.

The nature of the sources depends on the nature of the story, of course. On a police story it can be a patrolman or a detective who tells the reporter something because he likes him or because he is mad at his superiors or he thinks the public is being had. There are confidential sources in the military, officers who are not convinced of the total wisdom, let us say, of the Joint Chiefs. There are confidential sources in Wall Street, in sports, in the Black Panthers, in the theater, in the press, in political parties — just about everywhere, including the world of diplomacy. Often they are dissidents in the sense that they disagree with a policy or an order to keep it secret. Even a three-star general or a career ambassador can be a dissident at one time or another.

Confidential sources share some things in common. They do not wish to be identified either out of fear of legal or ad-

ministrative punishment or public opprobrium. And they trust the reporter to keep their identity secret and keep confidential certain information that might be used to track his sources, or they have until now.

**T**HE CONFIDENTIALITY of news sources is regarded by every newspaperman as an absolutely indispensable tool in getting news that goes beyond Government handouts. And until recently it was taken for granted that the reporter could guarantee confidentiality. Now he can do so only if he promises himself and his sources as a matter of journalistic ethics that he will go to jail rather than destroy the confidentiality that is vital to the free press. Most reporters and editors believe they are willing to go to jail if need be.

Some have gone to jail and others may — for refusal to identify sources or reveal information given in confidence. But perhaps our society is asking too much, not simply of the reporter and editor but of the dissident — whether in the Police Department or State Department. We now ask the dissident to trust the newspaperman to defy the courts and go to jail rather than to break faith.

But even if every reporter in the country were willing to go to jail, it would not solve the confidentiality problem. There is the impact on the sources to be considered. Some sources who normally would have given important information to the press have changed their minds. They would in the past have been willing to accept the reporter's word of honor. They are considerably less willing to do

so now that they know that the price of that word of honor may be an indeterminate jail sentence for the newspaperman.

We will never know what this loss of confidentiality of sources will cost because we will never know what we might have known. It seems entirely plain that the destruction of confidentiality of news sources will have an impact on how much the public knows about every aspect of public affairs. There will simply be fewer and fewer people in Government and out of Government willing to take the risk that the press will be able to protect them. It will not all happen tomorrow but it will happen as long as this country is ready to say that the

price of dissidence is exposure.

**T**HE ISSUE HAS SPREAD far beyond the Federal level. Judges and local district attorneys all over the country have taken the Caldwell case as a kind of hunting license to go after reporters on a wide variety of cases, all of them having nothing at all to do with national security. The potential impact on virtually every kind of serious reporting is a nightmare for journalists everywhere.

The Reporters Committee for Freedom of the Press already has listed 19 cases that it considers attempts by the courts to require news reporters to disclose the source or content of confidential or other unpublished information. The list also includes three attempts to get this kind of information from reporters by the use of legislative or executive subpoenas and seven attempts by the courts to enjoin reporting of public proceedings.

If confidentiality of news sources is really destroyed, it will mean that the press will be virtually dominated by the official version of what is taking place in American society wherever it touches upon government and that means just about everywhere—in the bureaucracy, the military, the judiciary, the police, the expenditure of funds, and on all levels of government.

Officialdom will be able to present its version, as always. Its access to the press will be unaffected. But elbowed out entirely will be those who need access most—people with something to reveal but not powerful enough to reveal it with their name-tags on it.

The issue of press confidentiality is approaching a crisis point. Its solution rests first in the public's understanding of its own involvement and then in protective legislation—state and federal laws to shield the newspaperman from court orders to reveal his sources.

This is not a matter of special privilege for newspapermen but for the First Amendment. You can't tell a carpenter he is free to practice his trade as long as he uses no tools. You can't tell a newspaperman that he has a free press as long as he does not use his tools and among them the essential tool is confidentiality of sources.

An editor in Boston, not overly given to drama, gave me a bumper sticker that summed up in four words just how important some of us think this is: "Save the First Amendment." If I had a car, I would stick it on.