New Life for the First Amendment

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Judge Charles Richey pumped a little life back into the First Amendment the other day in a way that deserves more than passing notice. He was ruling on preliminary motions in three lawsuits growing out of the Watergate burglary, tapping and bugging last June. Lawrence O'Brien, then chairman of the Democratic National Committee, brought an action for invasion of privacy and for money damages and he and the Democrats were countersued by officials of the Nixon campaign committee for abuse of process and libel and defamation.

After the issues were joined, investigative reporting by The Washington Post, The New York Times, The Wshington Star-News and Time magazine shed a substantial amount of light on the extent of the crime, its origins, the breadth of its implications and its financing. That reporting—since substantially confirmed by the trial of the Watergate defendants and the hearings on the nomination of L. Patrick Gray III to be FBI director—drew extraordinarily withering official fire from the White House, the Republican National Committee and the Nixon campaign committee during the campaign.

As the trial date drew near, lawyers for the Republican officials issued subpoenas to executives of The Post and reporters from all four publications, requiring them to produce—in addition to themselves—all notes, tapes, story drafts and other documents concerning the burglary and bugging as well as materials concerning other acts of political espionage. The subpoenas came in the wake of the Supreme Court's decisions in a set of cases last spring holding that the government did not have to make a showing of special need to subpoena reporters to come before grand juries with their notes and tapes. Despite comforting language in Justice Powell's pivotal concurring decision, the word went out that the First Amendment had been dented, as indeed it had. The question was, how much?

Judge Richey's decision is not a definitive answer or even a final one, but it is an important straw in the wind. Its essential meaning is that Justice Powell's language has had—and probably will continue to have—an impact on the federal judiciary as these First Amendment cases continue to come before the courts. Justice Powell said: "The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources . . .

"As indicated in the concluding portion of the opinion; the Court states that no harassment of newsmen will be tolerated . . . The asserted claim to privilege should be judged on the facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct."

Judge Richey seized upon that language, quashed the subpoenas and said some interesting things about the case, the First Amendment and the newsgathering function. He noted that he had a civil rather than a criminal case before him and that the people subpoenaed were not parties to the case. Moreover, he noted that the Republicans had made no showing that the information sought by the subpoenas was not available to them elsewhere. So, without foreclosing some future application by the Republicans, the judge quashed the subpoenas on the circumstances then before him.

On the way to his conclusion, the judge noted that the integrity of the judicial, executive and election processes were involved in the case and said, "This court cannot blind itself to the possible chilling effect the enforcement of these subpoenas would have on the flow of information to the press and, thus, to the public." The judge also noted the assertions by newsmen that without confidential sources, "investigative reporting would be severely, if not totally, hampered." And finally, he quoted James Madison, "A popular government without popular information, or the means of acquiring it, is but a prologue to a farce or tragedy, or perhaps both."

Thus, the judge invoked sharp insights and ringing principles to produce a limited decision. The major import of that decision is that although the protections offered by the First Amendment are not as broad as they were thought to be before the Caldwell case, the issue is at least not closed in the federal courts. Thus, the battles which are sure to come can be fought, not just steadfastly, but with some real modicum of hope.