

PRESS FREEDOM:

Scholars' Civil Liberties

By Nat Hentoff

We have become accustomed—but not, I trust, resigned—to the current Administration's "protective reaction" strikes against the press, including television. An especially crude recent attempt at chilling the initiative of critical investigative reporters was the FBI check on Washington-based Daniel Schorr of CBS News. Though the White House, once the story was out, claimed that the check was integral to Schorr's having been considered for a high Administration post, somehow no one outside the White House—Schorr included—believed that explanation. Mr. Schorr's reporting had annoyed the White House; he and other "disloyal" reporters were to be taught a lesson.

Yet, except for some mordant response—though all too little outrage—from the press, the Administration has suffered no evident political damage from even that bumbling a swipe at "the people's right to know." As Reuven Frank, head of NBC News, observes, "You and I will wait in vain for a candidate to speak out for the First Amendment." That may be somewhat overstated, but none of the potential Democratic opponents of Richard Nixon has, in fact, made the civil liberties record of this Administration a high priority issue. And I would be willing to bet that probably no major speech of any candidate will focus specifically on "The Engineering of Restraint: the Nixon Administration and the Press" (to use the title of Fred Powlidge's ACLU report).

Academics

All the less likely, therefore, is any political vulnerability resulting from yet another sector of the Administration's campaign against full freedom and full flow of information. In the past few months, a number of academicians have been subject to pressures from Washington that have not stirred much public interest but can be an ominous augury.

For one example, there has been the quite novel use of the FBI to question possible opponents of the President's nominations of Lewis Powell and William Rehnquist to the Supreme Court. Among those queried were such critics of previous Nixon nominations as Professors Gary Orfield (Princeton), Laurence Tribe (Harvard Law School), and Anthony Amsterdam (Stanford Law School) as well as Richard Seymour and Marian Wright Edelman of the Washington Research Project Action Council. By and large, the friendly FBI agents wanted to find out if these legal experts were assembling information on Powell and Rehnquist, the nature of that information, and the use to which that information was going to be put.

Clearly, none of this is the FBI's business; but as Professor Tribe put it, "The very fact of such queries by the FBI could be expected to have a predictable impact." The concern is not that any of those questioned this time has been intimidated, but rather what the result may be if this kind of pressure continues, as it indeed could if there is a second Nixon term. Not a few academicians, as may be remembered, fell suddenly silent during the time of Joseph McCarthy.

Council Subpoenaed

Yet another incursion by the government into what until now has been considered an inviolate area of research and analysis was the FBI's serving of a subpoena on the prestigious study group, the Council on Foreign Relations. Wanted was a seminar paper delivered last year by Dr. Daniel Ellsberg. Although such Council discussions are held under rigorous rules of confidentiality, extending to the Government, the FBI's subpoena was honored without the Council making a public protest and without the Council even informing its members of the event.

Can a scholar now feel entirely free to

speak in a "closed" session of the Council on Foreign Relations?

"I find it appalling," says Dr. Stanley Hoffman of Harvard with justified heat, "that one can't even give a paper before a study group without having it subpoenaed." And Ellsberg observed: "I was very disheartened at one more demonstration of a group of people who have forgotten or put to sleep their own sense of constitutional rights."

Arthur Goldberg, a member of the Council and angry at not having been informed, emphasized: "I have not delegated to the officers of the council my constitutional rights. And I feel that my constitutional rights have been eroded by this ill-conceived action."

Nonetheless, the flurry of protest was brief, and there is no indication that the present officers of the Council on Foreign

mony that could cause academicians to lose their confidential sources. In that event, the public's "right to know" would be just as affected, he claims, as it would be if a journalist were to jeopardize his sources as a result of compulsory testimony.

No scholar, so far as I know, has previously made this kind of claim to academic privilege. Falk is pursuing this course, he emphasizes, because "if this is an effort to intimidate scholars, then it is symbolically important to oppose it."

Falk has told me that he regards this attempt to compel him and other scholars to testify as part of the Government's effort to close off independent centers of thinking on foreign policy issues. He himself has frequently worked with, and supplied information to, senators critical of government foreign policy. "If people like me," he says, "are discredited, intimidated, or lose our sources, Congress will be deprived of one of the few aids it has to give it some leverage over the Executive."

Caldwell Parallel

In the brief which Falk's attorneys submitted in an attempt to quash the subpoena served on him, some reliance is made on the Earl Caldwell case. Caldwell, a New

freedom of inquiry, freedom of thought, and freedom to teach—indeed the freedom of the entire university community... Without these peripheral rights, the specific rights would be less secure." (Emphasis supplied in the brief.)

Frankfurter

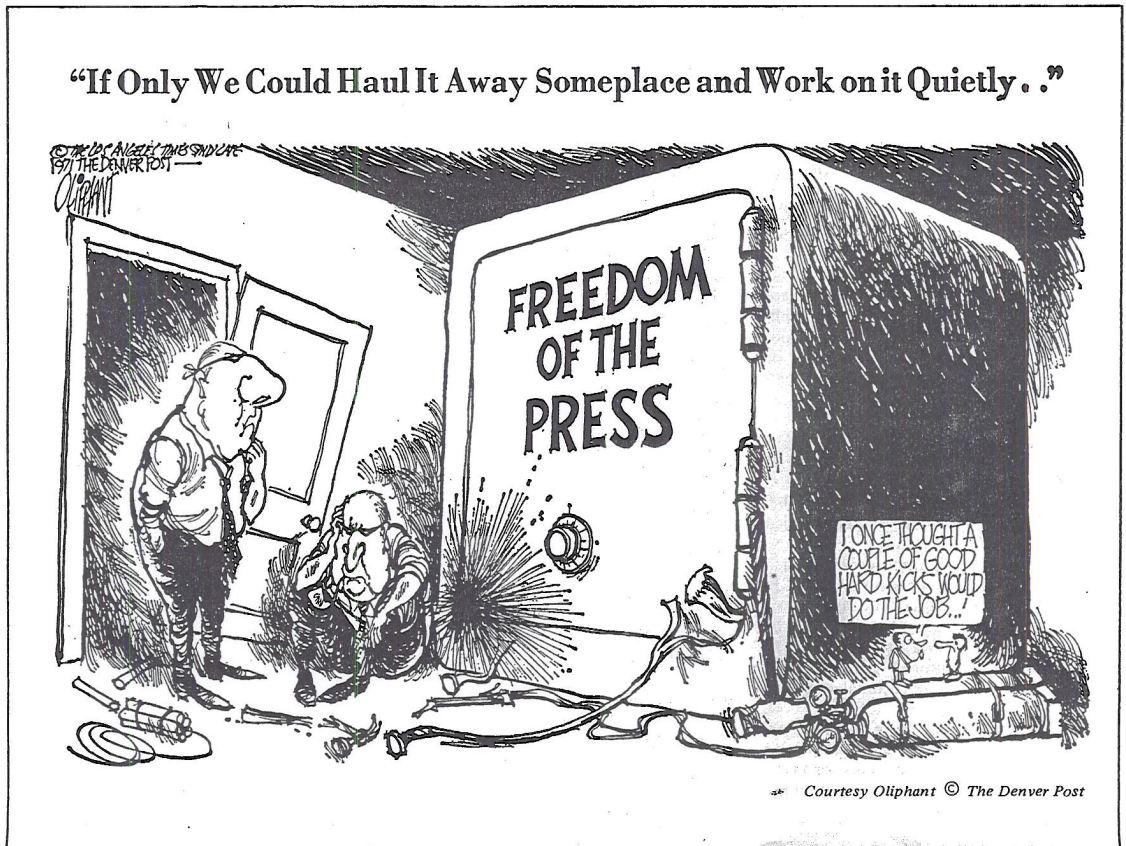
And from *Sweezy v. New Hampshire*, Justice Frankfurter is quoted on the dependence of a free society on free universities:

"This means the exclusion of governmental intervention in the intellectual life of a university. It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor."

District Court Judge W. Arthur Garrity, Jr. was not convinced that Falk merited immunity from testimony, seeing "no real likelihood that petitioner's sources of lawfully transmitted information will be inhibited by his mere appearance before the grand jury."

But the issue remains very much alive. Falk and the other two professors were called, it seems clear to me, as part of an Administration plan to try to intimidate,

"If Only We Could Haul It Away Somewhere and Work on it Quietly..."



Courtesy Oliphant © The Denver Post

Relations will act any differently should the FBI come knocking another time.

Secrecy

Daniel Ellsberg figures in another instance of Government invasion of scholars' constitutional rights. That is, the scholars directly involved contend their rights are being violated. As part of a federal grand jury investigation in Boston concerning how Ellsberg obtained and later circulated the Pentagon Papers, three professors were called to testify in secret.

Why? Apparently because all three are acquaintances of Ellsberg and all three have written extensively, and often critically, on American involvement in Viet Nam. The three are Richard Falk, professor of international law at Princeton; Noam Chomsky, a linguist at M.I.T.; and Samuel Popkin, an assistant professor of government at Harvard and a specialist in Vietnamese village life. Each has resisted testifying, both because their being called would seem to be part of a governmental fishing expedition into the activities of anti-war intellectuals and also because they strenuously object to being compelled to give information about their contacts and sources of information.

Richard Falk, in particular, has raised—so far unsuccessfully—a claim of academic immunity for scholars from forced testi-

York Times reporter, had refused to appear before a grand jury investigating the Black Panther Party on the ground that his mere appearance would cost him his confidential sources in black communities. A federal appeals court in California has upheld Caldwell's position, and the Government is appealing the decision to the Supreme Court.

It is true that Professor Falk is a journalist as well as an academician in that he writes for general circulation newspapers and magazines. And he has written books for a general audience. More and more academicians, as a matter of fact, devote part of their time to journalism, an important development in improving the quality of information that is corollary to "the people's right to know."

What is most arresting in Falk's brief, however, is the line of argument dealing solely with academic privilege. In making the point that scholarship and the processes of its distribution are protected by the First Amendment, the brief quotes from *Griswold v. Connecticut*:

"... the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read... and

and perhaps discredit, "disloyal" intellectuals. And Judge Garrity notwithstanding, Falk's sources could dry up just as could any journalist's if he were forced to testify.

As Falk's brief states: "... sources of information concerning the war, particularly, and foreign policy, generally, would be inhibited for fear of an attempt to compel disclosure before some future tribunal in some context as yet unknown. We would ask this Court to bear in mind that fears and inhibitions of this sort, particularly on the part of laymen and foreign sources [with whom Falk deals regularly] do not ebb and flow as a function of the technical distinction between 'mere appearance' and 'actual testimony.' That the government may seek to compel disclosures, not that such disclosures will actually occur, sets these chilling fears in motion."

I would appreciate hearing from academicians as well as from constitutional lawyers, concerning this First Amendment problem for scholars.

Nat Hentoff, a professional author, columnist and critic, is a member of the New York CLU Board of Directors and of ACLU's Free Speech Committee. He contributes regularly to Civil Liberties.