WASHINGTON REPORT:

Press Freedom—A Turning Point

This column appears in Civil Liberties *regularly. Look to it for information on congressional actions you can influence through communication with your congressmen, the press and other groups.*

By Arlie Schardt

One of the most important pieces of legislation to be considered by Congress in many years will begin a second round of hearings early in the next session.

The subject is freedom of the press or, perhaps more accurately, the people's right to know what their government is doing.

Until last year, most Americans assumed that their press could, if it were competent and willing, keep them informed about anything relevant to the operation of a democratic government. They assumed, as did virtually everyone in the media, that the First Amendment guaranteed the right of reporters to probe as deeply into government, and non-government stories, as their energies led them.

But that 200-year-old assumption evaporated last July when the Supreme Court decided in the *Caldwell* case, that reporters do not have the right to refuse to tell grand juries the identity of their confidential sources. The vote was 5-4, with Justice White joining the four Nixon appointees. Justice Rehnquist took part in the case although he had headed the Justice Department's Office of Legal Counsel at the time when the issue of subpoenaing reporters had grown so volatile that the Department formulated a set of guidelines to determine under what circumstances the subpoena power should be used.

Significance

The importance of confidential sources to effective reporting is obvious. Without them, most revelations of corruption in government could never take place. Yet the Administration sought to make it seem that the unwillingness of reporters to reveal their confidential sources meant that the press was unwilling to help prosecute criminals (one of the reporters involved in the *Caldwell* case had written an inside story on the drug traffic in Louisville, was subpoenaed, and refused to divulge his sources).

Indeed, the Court's decision even cited for support an alleged journalistic attitude "that it is better to write about crime than to do something about it."

The *Chicago Tribune* found this suggestion "so naive as to be astonishing. The type of crime most often involved in the confidence we're talking about is corruption in government. Who would ever stop it if it were not exposed in the press? How would the press be able to expose it without the help of confidential informants who were willing to tell what they knew to reporters whom they trusted?"

To the extent that sources now become unwilling to talk to reporters, said *The Tribune*, "the Court has turned itself into the protector of corruption and incompetence in government."

Strategy?

Others saw the decision as a natural extension, through President Nixon's court appointees, of the Administration's broad strategy to discredit and undermine the effectiveness of a free press. They cite the speeches of Spiro Agnew, the historic invocation of "prior restraint" against publishing (in the Pentagon Papers case), the unsettlingly narrow 6-3 Supreme Court decision to end that prohibition, the unprecedented FBI investigation of a reporter (Daniel Schorr of CBS), the attempt to cite CBS for contempt after its "Selling of the Pentagon" program, and the consistently vigorous efforts to keep the Administration closed off from public access.

The *Caldwell* decision can be viewed in still other ways. It reflects, for example, the evolution of the First Amendment, from issues generally involving individuals' or groups' right to free speech, to today's far broader issues of the people's right to know.

The case also points up the serious retreat of the press on a right considered basic (and guaranteed) for nearly 200 uninterrupted years. Suddenly, the press is faced with two choices, neither of which seems likely to restore the suddenly lost protection.

The first choice is to seek to regain as much of the former protection as possible through legislation. The Court did, very specifically, invite this option, even going so far as to say it is possible that newsmen's absolute immunity from subpoenas may be constitutional.

The second choice, as noted by the *Charlotte Observer's* editorial editor Reese Cleghorn, is to live with the decision until a Supreme Court comes along "that is stronger on the First Amendment's free speech and free press rights, or until abuses of the decision force the present court to modify the main weight of its decision."

Most news organizations, realizing they are not utterly vulnerable, and reasoning that a more progressive Court may be a long way off, are opting for legislation.

Media Views

Ironically, however—and this may either be a reflection of the degree to which the media have been intimidated, or a reflection on the actual willingness of the media to invest in vigorous (and expensive) investigative reporting—most of the media who have been heard from so far have opted for laws that would actually give them less latitude than they had before. Upcoming hearings, however, are expected to hear more from working reporters, rather than the management types who characterized much of the first session.

Scores of bills aiming to restore some degree of reporters' immunity from subpoenas have been offered in both houses of Congress. The first round of hearings took place early this fall before House Judiciary Subcommittee #3, chaired by Rep. Robert Kastenmeier of Wisconsin. The Kastenmeier committee will resume hearings early next year. Others will likely be held by Sen. Sam Ervin's Constitutional Rights subcommittee.

The proposed bills divide into two important categories. The first would give reporters total, unqualified immunity against having to disclose their confidential sources. The second would establish certain qualifications under which reporters may be compelled to reveal sources.

Unqualified protection is embodied in the identical bills offered by Rep. Jerome Waldie and Sen. Alan Cranston (both of California), numbered HR 15972 and S. 3786. The bill consists of a single sentence, saying that no one working for the press can be required by any court, legislature or administrative body to disclose "the source of any information procured for publication or broadcast."

The inclusion of reporters immunity before legislative and administrative bodies, as well as grand juries, is seen in the case of reporter Joseph Weiler of the *Memphis Commercial-Appeal*, who revealed that retarded children in a state hospital were regularly beaten by employees there. The state senate promptly investigated. Their aim: to learn who tipped off Weiler.

A Media Favorite

Many bills offer various types of qualified protection. The one receiving most attention so far is HR 16527, offered by Rep. Charles Whalen (Ohio). The Whalen bill has received support from a specially formed group called the Joint Media Committee, whose members include the American Society of Newspaper Editors, the Associated Press Managing Editors Association and other professional journalistic groups.

Briefly, the Whalen bill would provide broad immunity from disclosure but with two exceptions: disclosure of sources in civil actions for defamation where the defendant (say, a reporter being sued for libel) asserts his confidential source as the basis of his information; and disclosure of sources in any case where it can be shown, in a federal court hearing, that the source probably has information about a specific crime, that the information is unavailable elsewhere, and there is a "compelling national interest in the information."

Critics of the Waldie-Cranston bill feel that it goes too far (although actually it simply puts into writing a protection that until last year had been assumed all along). They contend that there are some instances where reporters should turn their information over to the law. Proponents, however, note that the Waldie proposal in no way prevents reporters from coming forth on their own, as they have often done in the past as a part of a long tradition of cooperation between the press and law enforcement agencies. But they feel that this decision must be left to the responsibility of the reporter, as it was before *Caldwell*. They say it is impossible to spell out or anticipate every situation in which disclosure may be required, and any attempt to do so will only leave reporters vulnerable to lazy or unscrupulous prosecutors and defense attorneys.

Hard to Qualify

Arguments over the qualified protections proposed in the Whalen bill are essentially the same as those above. But one additional point emerged with increasing clarity as the Kastenmeier hearings progressed: The difficulties in writing a law containing qualified immunity are almost insurmountable. There is no way to anticipate all the types of cases that could arise.

Nor, indeed, is there any real agreement on what to do, even among the media. How, for example, do you protect people from being libeled by careless reporters if reporters need not disclose the source of a defamatory story?

There is also confusion. Who should be protected? Some proposals cover only reporters for established broadcasters and newspapers. Others would include freelancers, authors of books, researchers, speech-writers and "alternate" media.

The only witnesses with an unequivocal position during five full days of hearings was the Justice Department, which opposed passage of any law whatsoever. The Department contends that newsmen are already protected from misuse of subpoenas by the Department's own guidelines (drawn up in 1970 in response to rising protests over the Department's misuse of subpoenas).

Assistant Attorney General Roger Cramton supplied evidence that Justice has indeed sharply decreased its use of subpoenas since creation of the guidelines. Before the guidelines, for example, CBS and NBC alone received 121 subpoenas in the first 30 months of the Nixon Administration. Justice Department figures indicate that since adoption of the guidelines, only nine press subpoenas have been issued in all.

But the one point on which all other witnesses did agree was the fact that guidelines are only that, they can be changed overnight at the whim of any future administration, while laws can not. Passage of some sort of law seems definite. The question is qualified versus unqualified immunity.

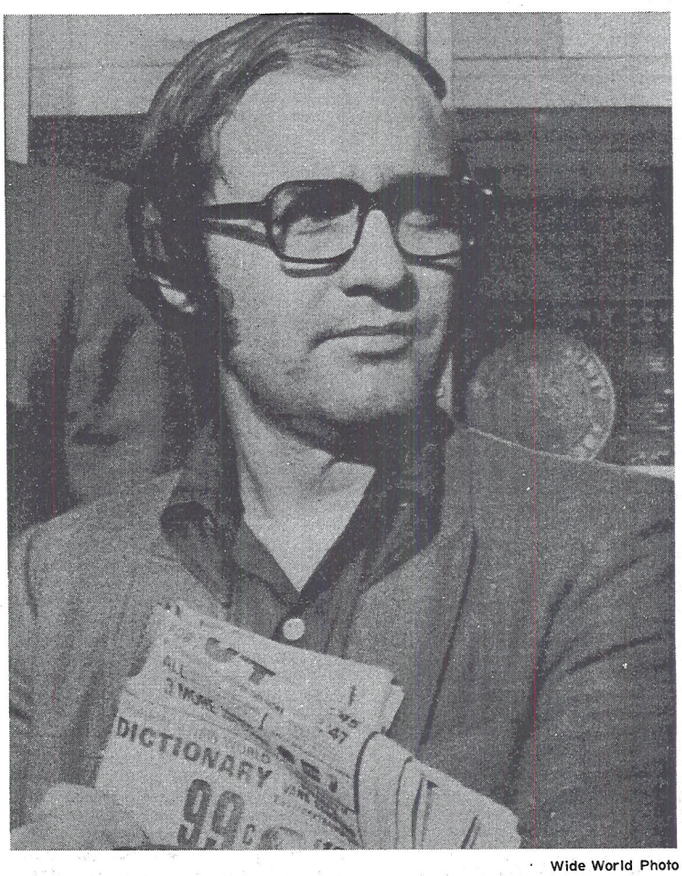
Placing the Risk

Thus, the problem comes down to a matter of where do you place the risk? Do you gamble on reporters to voluntarily testify—as they have in the past—if complete immunity is enacted? Or do you gamble on prosecutors and defense attorneys not to abuse their privilege if the law entitles them to subpoena reporters in some instances?

Sen. Cranston cited Harvard Law Professor Paul Freund in support of his bill: "It is impossible to write a qualified newsman's privilege," said Freund. "Any qualification creates loopholes which will destroy the privilege."

This, argue those favoring unqualified immunity, would in turn lead to a final irony. Once a law opens reporters to subpoenas, confidential sources will no longer risk exposure by confiding in reporters—and reporters will thus be of no value to prosecutors anyway, because they will possess no information worth having.

Arlie Schardt is associate director of ACLU's Washington office.



Wide World Photo

Peter Bridge, on his way to jail for refusing to answer grand jury questions about a newspaper story he wrote.