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Leaning On A Weak Reed

By Tom Wicker

IN THE NATION

Senator Sam Ervin of North Carolina has made clear the fact that those who are relying on Congress to restore a reporter's ability to protect confidential sources are leaning on a weak reed. This is not because Senator Ervin doesn't want to help; he and numerous other Senators, in fact, are anxious to pass some measure that would undo the Supreme Court's 5-4 decision in the Caldwell case.

But Senator Ervin has been around Congress long enough to know that the likelihood of passing a so-called "absolute bill"—one that would apply in any and every case—is near zero. Even that likelihood disappears when it is also demanded that an absolute bill be "pre-emptive"—that is, that it apply to state jurisdictions as well as to Federal proceedings.

There are several obvious reasons why this is so. The press is not admired enough for Congress to grant it such sweeping immunity. No one can say what might be the results, in unforeseen cases or on defendants, of an absolute bill. There are reasonable constitutional doubts—Senator Ervin has expressed his—about both the absolute and pre-emptive features.

Practically speaking, if these problems could be overcome in the Senate and a less sympathetic House, there can be not the slightest doubt that President Nixon would promptly veto the resulting bill; and two-thirds majorities to override are even less likely than the necessary votes to pass. Assistant Attorney General Roger Cramton said flatly at a Washington seminar yesterday that if any legislation were passed it would have to give judges "a lot of discretion"; that is, it could not be absolute.

This political situation is widely recognized, if not often admitted, although more and more supporters of Congressional action — for example, the American Newspaper Publishers Association and Dr. Frank Stanton of the Columbia Broadcasting System—have shifted from support of a qualified bill to advocating an absolute and pre-emptive bill.

Senator Alan Cranston, a stanch and early proponent of a reporters' protection bill, has pointed out that this trend reverses the political norm —that reasonable people usually move toward "the center" rather than away from it as an issue develops. Surely one reason for this reversal is tactical; the difficulties of enacting any reporters' protection bill are seen to be so formidable that supporters believe they must demand as much as possible to wind up with anything at all, when all the compromising and horse-trading will have been completed.

But the new bill Senator Ervin has proposed, in recognition of the practical impossibility of getting an absolute, pre-emptive bill, illustrates another, and contradictory, reason for the reverse movement Senator Cranston pointed out. It is that in this case "anything at all" might well be worse than nothing. The Ervin bill would make reporters subject to subpoena if they had "actual personal knowledge" of a crime, either by witnessing it or through receiving a confession; depending somewhat on its definition of what is a crime and what is a confession, this is a loophole through which almost any judge or grand jury could drive herds of reporters into the witness box.

The Department of Justice is contending at this moment, for instance, that it was a crime for Daniel Elisberg to have disclosed classified documents. Another limited bill by Senator Lowell Weicker would not grant immunity in Federal court in cases where the "national security" had been breached; but "national security"—what it is and what it is not—is almost classically a subjective matter, one no government hesitates to invoke for its own purposes.

Senator Cranston has pointed to another limited-immunity bill that would not permit a reporter to protect sources in cases involving "threat to human life," and has shown how this could be interpreted to force disclosure of the identity of confidential sources tipping off reporters to cases of substandard meat-processing or flammable clothes or other product deficiencies.

The hard truth is that while an absolute, pre-emptive bill is a political impossibility, any less sweeping bill will amount to an effective Congressional definition of *the limits of press freedom;* and those limits are likely to be narrowed rather than broadened by the later interpretations of judges.

In this situpation, the best procedure may not be legislative at all but a steady discharge by the press of its constitutional responsibilities, as best they can be performed, and a steady demand on the judiciary that it insure the constitutional protection of those responsibilities. To a reporter facing jail, or trying to deal with suddenly silent sources, this may seem a distant remedy indeed; but it may prove easier to live with than anything more immediate that Congress can achieve against divided public opinion and powerful Presidential opposition.