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Agnew Case: A Classic Battle on Press Freedom and Fair Trials

BY CLIFTON DANIEL

WASHINGTON, Oct. 5—One of the classic battles in the history of American jurisprudence is about to be fought on territory that no one could have envisioned a month ago. The territory is the ground Vice President Agnew and his lawyers have chosen for their first stand against the charges of corruption made against him in Maryland.

News Analysis

One issue in the battle is free press versus fair trial, the First Amendment to the Constitution versus the Sixth Amendment.

The First Amendment provides that Congress "shall make no law . . . abridging . . . freedom of the press." The Sixth Amendment says that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury."

The premise of Vice President Agnew's lawyers is that the news media, exercising freedom of the press, have published so many damaging allegations against their client that it will be impossible for him to get impartial treatment.

In Line of Fire

The lawyers have obtained unprecedented authority from a Federal judge to conduct their own investigation into alleged leaks of derogatory information to the press from the Justice Department. Their purpose is to show that the leaks are—in Mr. Agnew's words—"malicious, immoral and illegal," and therefore justify stopping the investigation of the Vice President.

They have started issuing subpoenas to newsmen, whom they intend to question under oath about the sources of published information. While the free press may not be their prime target, it has come into the line of fire.

The free press-fair trial issue is not a new one. It has been debated among lawyers, judges and journalists for decades. Until now, the question of prejudicial pretrial publicity—publicity that might affect the selection of an impartial jury—has generally been raised only when an arrest has been made or a grand jury indictment returned and a trial is imminent.

In the Agnew case, however, his lawyers contend that the accused cannot get even a fair investigation of his case by a grand jury because of the prejudice created against him by news leaks.

Although the Constitution refers only to a trial and not to an investigation preliminary to a trial, Federal Judge Walter E. Hoffman seemed to be impressed by the defense argument.

In granting authority for the defense to investigate leaks, Judge Hoffman said in Baltimore last Wednesday, "We are rapidly approaching the day when the perpetual conflict between the news media, operating under freedom of speech and freedom of the press, and the judicial system, charged with protecting the rights of persons under investigation for criminal acts, must be resolved."

Not Faced Squarely

Judge Hoffman is plainly interested in hastening the resolution of that conflict, the conflict between the First and Sixth Amendments.

Various attempts, mostly futile, have been made to resolve the conflict by rules and regulations, legislation and court action. In more than a score of states, the bar and bench, the press and law enforcement agencies have in recent years joined in adopting voluntary fair trial-free press guidelines. Some of these voluntary efforts have had local and limited success, but they obviously have not settled the issue.

So far, the courts have not faced it squarely. Occasionally, a new trial has been ordered or a trial has been moved to another jurisdiction because of the publicity surrounding a case.

Just last month in New York, Federal Judge John R. Bartels dismissed the jury in a case against Carmine Persico and tried the case himself because The New York Times and The Daily News referred to the criminal records of Persico and other defendants, contending that that information was essential to an understanding of the case.

Pentagon Papers

In the most widely publicized of such cases, Dr. Sam Sheppard of Cleveland was granted a new trial after serving 12 years of a sentence for murdering his wife. The Supreme Court held that his first trial had not been a fair one because it was surrounded by "virulent publicity" and a "circus atmosphere." However, the Supreme Court blamed the judge in the case more than the press.

Thus far, the courts have held that, under the First Amendment, there can be no prior restraint of the press—that is, no action to prevent the press from publishing information they have obtained. That principle has been upheld in many cases involving the reporting of judicial proceedings.

In a case of another kind, it was upheld most dramatically in the 6-to-3 decision of the Supreme Court in 1971 declining to interfere with the publication of the Pentagon papers, a secret official history of American involvement in Vietnam.

However, in the Agnew case, journalists face a hazard that did not exist before June 29, 1972. On that day, the Supreme Court held 5 to 4 that journalists have no First Amendment right to withhold from grand juries the names of confidential sources and information given to them in confidence.

That decision was rendered in the case of Earl Caldwell, a reporter for The New York Times, who had refused to be questioned by a Federal grand jury about information he got from the Black Panther party.

Earl Caldwell was never questioned because the grand jury he defied had been disbanded by the time the Supreme Court's decision was handed down. The Caldwell decision stands, however, and may well be invoked by Vice President Agnew's lawyers when they start their investigation of news leaks.

Efforts to force newsmen to disclose their confidential sources will certainly be resisted by lawyers for the press on a variety of grounds. They will be able to point out that the Caldwell decision, according to Justice Lewis F. Powell Jr., who concurred in it, does not deprive newsmen of their constitutional rights "with respect to the gathering of news or in safeguarding their sources."

Investigative Reporting

They will probably contend, as a spokesman for The New York Times said today, that "unless reporters can use information from persons not in a position to have their names revealed, investigative reporting will be eliminated," and one of the purposes of the First Amendment was to foster investigative journalism.

Before and after the Caldwell case, various states enacted so-called shield laws to protect newsmen from having to disclose their sources. Maryland has such a law, and it may be invoked in the Agnew case, even though the case is being handled by Federal authorities.

A Federal shield law has been under consideration in Congress, but has so far not reached the floor of either house because of divisions of opinion on what such a law should say and whether it is wise to have one.