WXPost OCT 7 1973

The Press and the Agnew Case

The current administration has a genius for pushing the country into situations which place undue and unwelcome stress on our durable old Constitution. The latest in the line of a seemingly unending stream of sharp constitutional tests has been posed by Vice President Agnew's assertion that the Department of Justice has engaged in a systematic and deliberate campaign of leaking information to the press in an effort to destroy him politically, in the course of destroying any chance he may have of receiving a fair hearing before a grand or petit jury. This has led to issuance by Mr. Agnew's lawyers of subpoenas to reporters from The Washington Post, The Washington Star News, The New York Times, The New York Daily News, CBS News, NBC News, and Newsweek and Time magazines. All of this presages a monumental and, in our view, an entirely avoidable constitutional confrontation over the First Amendment.

Mr. Agnew revealed on Aug. 6 that he had been informed that he was the target of a federal grand jury investigation. There can be no doubt that since that time numerous stories based on information from sources close to the investigation have appeared concerning the nature of the charges being made against the Vice President, the names of the witnesses against him, his state of mind and the nature of the negotiations between his lawyers and the Department of Justice. From this, his lawyers have drawn the conclusion that "a number of officials in the prosecutorial arm of our government have misused their offices in an immoral and illegal attempt to drive the Vice President from the office to which he was elected, and to assure his conviction."

Since Judge Walter E. Hoffman issued no opinion on the motion in which this argument was made, one cannot know with certainty just how he reacted to that rather startling assertion. He gave two pretty clear indications of his thinking, however. First, he granted the Vice President's lawyers extraordinary authority to take depositions in a criminal proceeding prior to the conclusion of grand jury deliberations and he gave them subpoena power to make the taking of those depositions possible. The second hint came in his very strong admonition to the grand jury to consider only the evidence presented to it and to disregard press reports in the case. In the course of that statement, Judge Hoffman went on to say:

> *We are rapidly approaching the day when the perpetual conflict between the news media, operating as they do 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.*

The first question is whether such a conflict really does exist. And the next question is whether this case offers the best occasion for resolving it. We believe that the answer to both questions is, no. The Constitution is full of useful ambiguity which through our history has permitted reasonable men to reconcile conflicting rights and interests in a spirit of accommodation which preserves the essence of the Constitution without placing unbearable stress on our nation's institutions. Constitutional clashes have generally been avoided, and wisely so, whenever possible. Such a clash could have been avoided here.

Mr. Agnew's argument is that he should not be indicted because, among other things, the prosecutors have fatally flawed their case by filling news pages and the airwaves with prejudicial information against him. While he has every right to assert that claim, we would doubt that it has much substance. The fact that the trials of Sirhan Sirhan, Angela Davis, Jack Ruby and Bobby Seale were successfully concluded indicates that American judges know very well how to pick juries in highly publicized criminal cases and we do not see how Mr. Agnew's trial—if it ever comes to that—would be all that much more vulnerable to prejudicial pre-trial publicity, especially since the publicity has clearly cut both ways.

At the most, his assertions, if supported by the facts, might indicate that other prosecutors or another special prosecutor should be named to handle his case.

And that is the heart of the matter. Mr. Agnew's grievance is with the Department of Justice and not—as he himself has acknowledged—with the press. The press is peripheral to his argument. Attorney General Elliot L. Richardson has conducted an investigation into the leaks alleged to have come from his department. Mr. Agnew's lawyers can—as they may well have already done—subpoena the Attorney General and any officials working for him, including the FBI agents who have questioned federal prosecutors. It is hard to believe that Mr. Agnew's highly skilled defense team, building upon the information already developed within the department, cannot ferret out the information they need by means of interrogations conducted under oath.

To go beyond that by asking reporters to reveal the names of sources who gave information under a pledge of confidentiality is to jeopardize an extraordinarily important constitutional principle by use of a legal ploy that is not only premature but probably marginal in the case at hand. The First Amendment right of freedom of the press is not a right flowing to newsmen individually or collectively. It is, rather, grounded on the founding fathers' belief that only a people free to receive the greatest possible flow of information could govern themselves wisely. Thus, the right put into jeopardy here is the reader's right or the viewer's right to receive as much information as newsmen—by the exercise of their best judgment rather than that of some governmental instrumentality—can conscientiously gather and responsibly present to them.

The Agnew case illustrates the point. The professional obligation of the press is to question the veracity and probable accuracy of the information their sources have revealed. And a further mission of the press is to provide the public with as much information as possible about the fitness of elected officers to conduct the people's business; this is fundamental to public participation in the democratic process.

The ability to assure confidentiality to sources is vitally important to this mission. That ability was severely jeopardized in *Branzburg v. Hayes,* in which the Supreme Court decided that pledges of secrecy made by reporters did not outweigh the obligation to respond to a grand jury subpoena and to answer questions in a criminal investigation. If the press' ability to guarantee confidentiality is limited even more, the capacity to inform the public will be severely, if not irreparably, impaired.

This newspaper has long believed that the words of the First Amendment were sufficient unto themselves and that judicial or legislative efforts to define or codify these freedoms in precise and detailed terms are potentially damaging to the freest possible flow of information to the public. For years prior to the Branzburg decision, informal accommodations which served the interests of justice and preserved the principle of freedom of the press were possible. With the Branzburg decision on the books, each new situation presents yet another threat to the free functioning of the press. Lawyers like to say that hard cases make bad law. It can likewise be said that incautious challenges to broad constitutional principles can lead, not to greater clarity and precision, but to bad constitutional precedents—to the progressive erosion, in short, of fundamental rights which, by their very sweep and breadth, have served us well for almost two centuries.