Editorial

The Anemic First Amendment

In its rush to adjourn and get on the campaign trail, Congress has given short shrift to a number of items that should rate high priority on the nation's agenda. Welfare reform, mass transportation, housing, gun control, and the minimum wage are just a few of the items on the list of "unfinished business."

Action was also deferred on an issue that has been less widely noticed but that has vital bearing on the First Amendment, one of the key foundation stones of our liberty as a result of its guarantee that "Congress shall make no law . . . abridging the freedom of speech or of the press." In recent months more than a score of bills have been introduced in the Senate and the House of Representatives to protect newsmen from being compelled to divulge the sources of their information. None have come to a vote, and the outlook for passage of any of them by the next Congress is uncertain.

Such legislative protection is necessary because both the executive and the judicial branches have been bleeding the First Amendment white over the last few years. The Nixon administration entered office with a strong antipathy to the press and made no secret of the fact.

It was not long before the Justice Department began issuing a cloud of subpoenas aimed at prying loose information from reporters on stories involving the activities of Black Panthers, antiwar militants, and other dissenters. The publication of the Pentagon Papers led to an increase in such activities. For example, the small and financially fragile Beacon Press of Boston, which published four volumes of the Papers that Alaska's Mike Gravel had read into the Senate record, has already spent $50,000 in legal fees connected with an expected indictment.

The government's penchant for slapping subpoenas on reporters and publishers—whether to investigate or to intimidate—was chilling enough. What made it worse was a June 29 Supreme Court decision holding that newsmen could not refuse to give a grand jury information about their confidential sources. The vote was 5 to 4.

Justice Byron R. White, who wrote the majority decision, concluded that "the First Amendment interest asserted by the newsman was outweighed by the general obligation of a citizen to appear before a grand jury or at trial . . . and give what information he possesses." If newsmen were granted blanket immunity against such obligations, White asked, what would keep lecturers, political pollsters, novelists, academic researchers, and dramatists from doing the same? "Almost any author may quite accurately assert that he is contributing to the flow of information to the public, that he relies on confidential sources, and that these sources will be silenced if he is forced to make disclosures before a grand jury," he wrote. The majority assured, however, that, if a grand jury investigation were "conducted other than in good faith," a reporter would have a case. Official harassment of the press undertaken not for the purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification," White wrote. In a concurring opinion Justice Lewis F. Powell, Jr., sought to amplify that assurance. "We do not hold that . . . state and federal authorities are free to 'annex' the news media as an investigative arm of government,' " he wrote.

Among the dissenters, only Justice William O. Douglas asserted an absolute privilege for newsmen under the First Amendment. "The function of the press is to explore and investigate events, inform the people what is going on, and to expose the harmful as well as the good influences at work," he wrote in a separate dissent. "If [a newsman] can be summoned to testify in secret before a grand jury, his sources will dry up and the attempted exposure, the effort to enlighten the public will be ended." The accuracy of that statement has already been affirmed by Earl Caldwell, a *New York Times* reporter who refused to answer a subpoena to testify on Black Panther activities. His case was one of those involved in the June 29 Supreme Court decision. In an article in this magazine [*SR*, Aug. 5] Caldwell wrote: "In another month I'll be heading back west . . . for the *Times*. I still have not figured out how I can go back into the black community—or any community, for that matter—and present myself as a journalist. Hell, even the Supreme Court has now said that there is nothing wrong with forcing a reporter to become a spy."

The three other dissenters asserted a less absolute privilege for newsmen. Justice Potter Stewart, who wrote the principal dissenting opinion, conceded that the government has a right to force a reporter to appear before a grand jury if it can show 1) that it is seeking information "clearly relevant to a precisely defined subject of governmental inquiry" and 2) that the reporter is the only available source of such information.

Thus, legislation is the newsman's best recourse. Nineteen states now have "shield" laws that protect reporters from being forced to identify their news sources. Most of the bills before Congress would provide immunity except in cases involving national security or a threat to life. The only measure offering absolute immunity is one introduced by Democratic Sen. Alan Cranston of California, who would prohibit a newsman's being compelled to disclose "any information or the source of information procured for publication or broadcast."

A strong case can be made, however, that granting newsmen absolute immunity has its dangers. In the *Columbia Journalism Review* Fred W. Friendly, former president of CBS News, recalls how in 1937 a subpoena had to be used to pry loose some newsfilm showing that Chicago police were responsible for firing into a crowd of striking steelworkers and their families, killing ten. Until the film was released, the accepted story was that the steelworkers had attacked the police, and public opinion ran strongly against the entire labor unionization movement. Noting that this could happen again, Friendly proposes a limited shield law that would "provide protection for the public's need to know, but not be a sanctuary for those who, because of fear, special interests, or just plain irresponsibility, are seeking a privileged place to hide."

That makes sense, since unlimited immunity could lead to dangerous abuses. The problem is that, unless the Nixon administration shows considerably more restraint in its use of the subpoena and unless the Supreme Court modifies what Justice Stewart calls its "crabbed view of the First Amendment," the government may be guilty of even more dangerous abuses.

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