TIME

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THE PRESS

Fight Over Freedom and Privilege

Congress must attempt to be as wise as the drafters of the First Amendment 200 years ago. A press which is not free to gather news without threat of ultimate incarceration cannot play its role meaningfully. The people as a whole must suffer. For to make thoughtful and efficacious decisions—whether it be at the local school-board meeting or in the voting booth—the people need information. If the sources of that information are limited to official spokesmen, the people have no means of evaluating the worth of their promises and assurances.

THUS Senator Sam Ervin of North Carolina eloquently set out an issue commanding increasingly urgent attention among journalists and Congressmen: Do newsmen need legal guarantees, beyond the First Amendment, to protect them and their confidential sources from official prying? The mood in Congress is to answer with an emphatic yes, and it seems likely that some law according journalists the legal privilege of refusing to disclose their sources will pass this year. Last week Ervin's Senate Judiciary Subcommittee on Constitutional Rights began a series of hearings designed to determine how broad that privilege should be.

The Supreme Court last June rejected some reporters' claims that the First Amendment gave them an absolute right to withhold all confidential sources or information from grand juries. The best known of three cases involved New York *Times* Reporter Earl Caldwell, whose work among West Coast Black Panthers in 1970 had gained him the attention of a federal grand jury, which subpoenaed him to testify "concerning the aims, purposes and activities of that organization." Caldwell argued that even his appearance at closed hearings would destroy his relationship with his sources. By a 5-4 decision, the Supreme Court ruled against him. Aware that a lower-court judge had handed down a ruling limiting the kind of questions Caldwell could be forced to answer, the court said that at least he had to appear before the jury.

In general, said the court, "We see no reason to hold that these reporters, any more than other citizens, should be excused from furnishing information that may help the grand jury in arriving at its initial determinations." In a concurring opinion, Justice Lewis Powell Jr. stressed the "limited nature" of the decision. A newsman who feels that subpoena powers against him are being abused, Justice Powell wrote, "will have access to the court on a motion to quash and an appropriate protective order may be entered"—a proviso that suggests that the court would be willing to consider some form of privilege on a case-by-case basis.

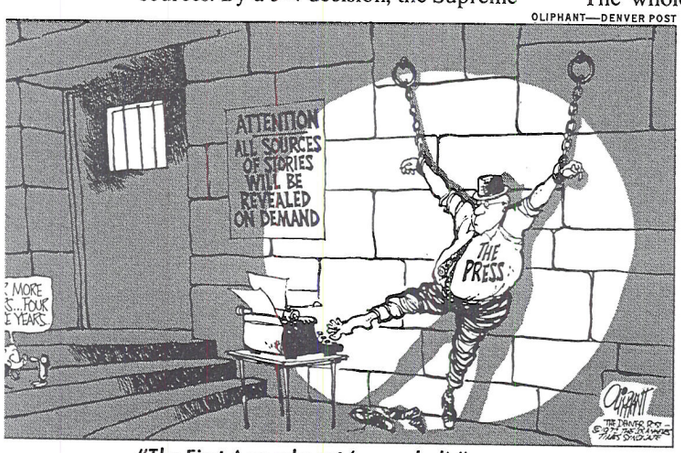
Jail. Since the Caldwell decision, judges, lawyers and grand juries across the country have taken to subpoenaing newsmen with alarming frequency. According to The Reporters Committee for Freedom of the Press (a group of Washington-based journalists who offer legal assistance to endangered colleagues), more than 35 newsmen have been slapped with contempt citations for refusing to disclose confidential sources or material, and some have been jailed. Among the more celebrated inmates: Peter Bridge, a reporter for the now defunct Newark *News*, spent three weeks in jail last fall after refusing a New Jersey grand jury's demand that he amplify a story he had written on civic corruption. Los Angeles *Times* Washington Bureau Chief John Lawrence was jailed briefly last December by a district court judge for refusing to surrender tapes of an interview with a principal in the Watergate bugging, Alfred Baldwin III.

The whole issue has been colored by the ongoing war between the Nixon Administration and the press, including threats to use antitrust laws against television networks and enforce "fairness" in TV news through the power to grant or withhold licenses. Also part of that conflict has been alleged FBI wiretapping of reporters' telephones in hopes of tracing government news leaks *(see* THE NATION). But the chief concern remains the question of a newsman's right to keep his sources confidential. Nearly 50 bills designed to protect newsmen and their informants have already been submitted (40 in the House and nine in the Senate); Wisconsin Representative Robert Kastenmeier, chairman of a House judiciary subcommittee considering newsmen's rights, expects that number to exceed 100. But formidable questions must be resolved before legislation can be drawn up.

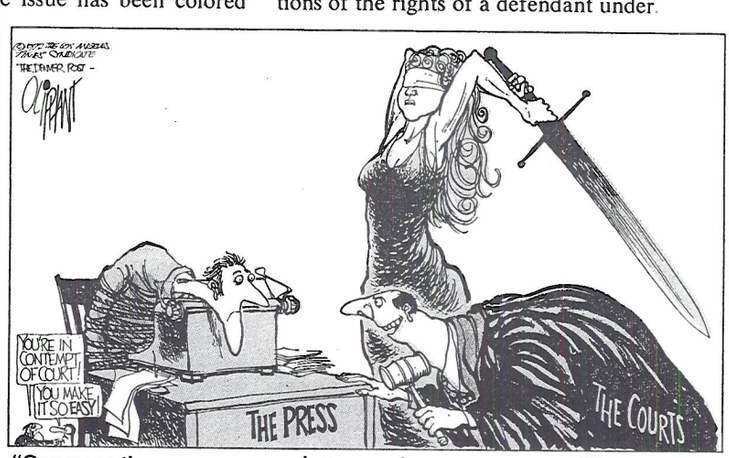
Many newsmen—particularly those who have been jailed—are pressing for a law that would afford them absolute protection from subpoenas of confidential material at the federal or local level. "A newsman must be granted immunity from being forced to divulge *any* information or source identity before *any* investigating body," says Peter Bridge. Clayton Kirkpatrick, editor of the conservative Chicago *Tribune*, worries about press "abuses" but adds: "The hostility in the courts has pushed this newspaper into an extreme position —[backing] an unqualified shield [law]." Kirkpatrick contends that the courts have abused their powers to subpoena newsmen, and that the decision of what to reveal must now be left to newsmen themselves. A typical absolute-shield bill has been introduced by California Representative John Moss: "No person shall be required to disclose to any grand jury, or court of the United States, or to the Congress, or to any agency the source from or through which such person received information in the capacity as a newsperson."

But there are grave doubts about this kind of a bill. Conservative Columnist James Kilpatrick opposes absolute-shield laws as "unconstitutional. They could result in intolerable violations of the rights of a defendant under

OLIPHANT—DENVER POST



"The First Amendment (amended)."



"One more time—are you ready to reveal your news sources?"

the Fifth and Sixth Amendments." The Fifth Amendment says that indictments for capital or "otherwise infamous" crimes can be handed down only by grand juries; this safeguard against unjust accusation could be weakened if the amount of evidence available to grand juries were reduced. Similarly, the Sixth Amendment guarantees a defendant the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor"; both rights could suffer if an entire profession were excused from cooperation at trials. In other words, many newsmen who argue for absolute privilege seem to cast the possible confrontations always in terms of government *v.* press. But it is just as likely that newsmen would be subpoenaed by individual defendants who are falsely accused of a crime or feel themselves persecuted by the authorities or some powerful group.

Newsmen should also be wary about demanding an absolute privilege broader in scope than that accorded to their fellow citizens, including lawyers, doctors and clergymen. The parallel is far from exact, since the journalist's public service role is to report information and his prime obligation is to his readers, while members of other professions must serve their private clients first. The law varies by state, but in New York, for example, those professions granted privilege get it only in specific situations (anything said to a priest in the confessional is privileged). Lawyers may not withhold information about a client's intent to commit a crime. In all three professions, privilege can be waived by the clients.

The most likely alternative to absolute privilege is a "qualified-shield" bill providing protection within carefully circumscribed limits—which is almost certainly the only kind of bill Congress would pass. Ervin last week introduced a bill that would provide for immunity unless a newsman had "actual personal knowledge which tends to prove or disprove the commission of the crime charged or being investigated."

A qualified bill might strike a fairer balance between the rights of journalists and their fellow citizens. But it would also open the way for abuse by aggressive prosecutors and unsympathetic judges. A shield with limitations might create more problems than it would solve since all limitations would be endlessly arguable. Says Los Angeles *Times* Editor William Thomas: "We'll probably get a qualified bill, and we'll go on spending our time in the courts."

RUNTZ—BANGOR DAILY NEWS

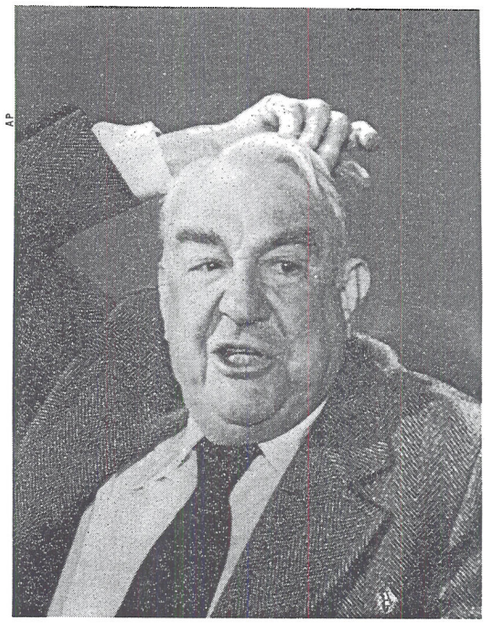
"Psst, mister...read all about it!"

Crazy Quilt. Many journalists would prefer not to have shield laws at all but to depend on the First Amendment and fight each incursion on their freedom case by case rather than relying on congressional remedies. The very act of defining the sweeping phrases of the First Amendment that protect press freedom would also limit that freedom. Ervin expressed those doubts at the opening of his subcommittee hearings last week: "The same Congress which grants the privilege may condition it on proper conduct. A future Congress, irritated by a critical press, may hold repeal of the privilege as a threat to secure a more compliant press. What is now protective legislation may tomorrow be a hostage to good behavior."

Qualified or not, a federal law would cover only part of the problem, and a diminishing one at that. Since August 1970, when the Justice Department instituted new guidelines to the effect that such federal subpoenas must be cleared with Washington, only 13 subpoenas have been written; eleven of the journalists concerned had agreed in advance to cooperate. A federal statute might elevate the Attorney General's guidelines into law, but it would leave unaffected the crazy quilt of codes in the 19 states that have shield statutes. Congress could in theory override state laws to offer federal protection for newsmen at the local level, but in practice such a sweeping measure would be unlikely to pass.

The greatest flexing of subpoena power has been at the state and local level. The Chicago *Tribune* has collected more than 350 subpoenas since the 1968 Democratic convention. In the past three years, the Los Angeles *Times* has spent $200,000 fighting 30 subpoenas and uncounted man-hours fending off 50 more that were threatened. Many of these subpoenas contained no danger to reporters' sources but merely demanded testimony that might speed and enliven legal proceedings. In hope of discouraging such time-consuming requests, reporters at the Chicago *Daily News* have been instructed to destroy their notes.

A federal law granting total or partial immunity to newsmen might require a definition of the class it protects. In opposing a shield law last winter, Connecticut Governor Thomas Meskill caustically challenged a reporter's right to claim professional standing: "What specific training does he need? None. What examinations must he pass to be qualified? None." Adds Robert Greene, who heads the investigative team for Long Island's *Newsday:* "If a shield law is passed, a reporter should be defined. He should work for a bona fide organization. But what is a bona fide organization?"



SENATOR ERVIN AT HEARINGS LAST WEEK
Trying to strike a balance.

Any definition that excludes members of the underground press, pamphleteers or professor-writers could narrow the same free flow of information that Congress and the press wish to enlarge.

Without some protection, though, reporters worry that their sources of information will dry up when they cannot be guaranteed anonymity, and the real loser will be the public interest. "There are two sources in Boston that are definitely no longer available to us," says Gerard O'Neill, editor of the Boston *Globe's* Pulitzer-prizewinning investigative team. "They've helped us before, but since the Caldwell decision, in spite of all our blandishments, they won't even talk to us on collateral subjects." *Globe* Assistant Managing Editor Timothy Leland thinks an upcoming investigative series could land six *Globe* editors and the publisher in jail if a grand jury decides to subpoena. "We spelled this out to one or two reporters whom we wanted to work on the story," he says. "They considered it combat duty and backed out."

Within the past year, two TV networks took the unusual step of turning down exclusive news stories. CBS declined to film an interview with a woman who had promised to tell how she cheats on welfare, and ABC canceled talks with Black Panthers in their Oakland headquarters. The reason in both cases: executives felt they could not offer guarantees of anonymity to their subjects. Says California Representative Moss, an active foe of Government secrecy: "It's difficult to tell you I've seen it, but I just sense that there's some sharpness missing from my evening news and the stories I read in the papers. It's so subtle; the erosion can take place and you hardly notice it."