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Senate

S. 158: FREE FLOW OF INFORMATION ACT—AMENDMENT

AMENDMENT NO. 27

(Ordered to be printed, and referred to the Committee on the Judiciary.)

AMENDMENT OF S. 158

PRESERVING THE FREE FLOW OF NEWS TO THE PUBLIC

Mr. CRANSTON. Mr. President, on January 4, 1973, I introduced, on behalf of the American Newspaper Publishers Association—ANPA—S. 158, the proposed "Free Flow of Information Act." Today, I submit for printing for myself and the Senator from Massachusetts (Mr. KENNEDY) an amendment (No. 27), in the nature of a substitute, to that bill.

This amendment is the product of consultation with representatives of the ANPA and extensive discussions with representatives of the other organizations and entities in the print and electronic media who cooperated in producing the original draft of S. 158.

PURPOSE TO STRENGTHEN IMPLEMENTATION OF PRINCIPLES UNDERLYING S. 158

Our purpose, Mr. President, is to strengthen S. 158 by providing for unqualified protection of news and news sources at all levels of government and official action. Those were the principles underlying S. 158 as introduced. And it was in support of those principles that I introduced S. 158—by request—on the first day of this Congress.

Mr. President, my support for these principles has never diminished. It is, if anything, today stronger than ever in view of the continued harassment of the news media as exemplified by FBI subpenas for the Jack Anderson phone records and now the subpenaing of reporters, editors, and publishers from our four major newspapers by the Committee To Reelect the President.

During the past 2 months I discussed the provisions of S. 158 with numerous other Senators, journalists, publishers, public officials, and private citizens. It became clear that there were aspects of S. 158 that needed redrafting so as to strengthen the implementation and the thrust of its underlying principles. It also appeared desirable to include certain additional provisions.

MEDIA EXTENSIVELY CONSULTED

My staff and I discussed these changes with the ANPA and others in the news media to obtain their counsel. I am profoundly grateful for their extraordinary cooperation and for their contribution to our joint effort. I feel that through our revisions we have achieved a much more sound, as well as stronger legislative proposal.

At this point, Mr. President, I ask that there be printed in the RECORD the full text of the amendment Senator KENNEDY and I are submitting today.

There being no objection, the amendment was ordered to be printed in the RECORD, as follows:

AMENDMENT No. 27

On page 1, strike out all after the enacting clause and insert the following in lieu thereof:

That this Act may be cited as the "Free Flow of Information Act".

FINDINGS AND DECLARATION OF PURPOSE

SEC. 2. The Congress finds and declares that—

(1) the purpose of this Act is to preserve the free flow of news to the public through the news media;

(2) a public fully informed about events, situations, or ideas of public concern or public interest or which affect the public welfare is essential to the principles as well as the effective operation of a democracy;

(3) the public is dependent for such news on the news media;

(4) those in the news media who regularly gather, write, or edit news for the public or disseminate news to the public must be encouraged to gather, write, edit, or disseminate news vigorously so that the public can be fully informed;

(5) such persons can perform these vital functions only in a free and unfettered atmosphere;

(6) such persons must not be inhibited, directly or indirectly, in the performance of such functions by governmental restraint or sanction imposed by governmental process;

(7) compelling such persons to present testimony or produce material or information which would reveal or impair a source or reveal the content of any published or unpublished information in their possession dries up confidential and other news sources and serves to erode the public concept of the press and other news media as independent of governmental investigative, prosecutorial, or adjudicative processes and functions and thereby inhibits the free flow of news to the public necessary to keep the public fully informed;

(8) there is an urgent need to provide effective measures to halt and prevent this inhibition in order to preserve a fully informed public:

(9) the practice of the news media is to monitor and report across State boundaries those events, situations, or ideas originally reported locally in one State which may be of concern or interest to or affect the welfare of residents of another State;

(10) the free flow of news to the public through the news media, whether or not such news was originally published in more than one State, affects interstate commerce;

(11) this Act is necessary to implement the first and fourteenth amendments to the Constitution of the United States and article I, section 8 thereof by preserving the free flow of news to the public, the historic function of the freedom of the press.

EXEMPTION

SEC. 3. No person shall be compelled pursuant to subpena or other legal process issued under the authority of the United States or of any State to give any testimony or to produce any document, paper, recording, film, object, or thing that would—

(1) reveal or impair any sources or source relations, associations, or information received, developed, or maintained by a newsman in the course of gathering, compiling, composing, reviewing, editing, publishing, or disseminating news through any news medium; or

(2) reveal the content of any published or unpublished information received, developed, or maintained by a newsman in the course of gathering, compiling, composing, reviewing, editing, publishing, or disseminating news through any news medium.

PRESUBPENA STANDARDS AND PROCEDURES

SEC. 4. (a) No subpena or other legal process to compel the testimony of a newsman or the production of any document, paper, recording, film, object, or thing by a newsman shall be issued under the authority of the United States or of any State, except upon a finding that—

(1) there are reasonable grounds to believe that the newsman has information which is (A) not within the exemption set forth in section 3 of this Act, and (B) material to a particular investigation or controversy within the jurisdiction of the issuing person or body;

(2) there is a factual basis for the investigation or for the claim of the party to the controversy to which the newsman's information relates; and

(3) the same or equivalent information is not available to the issuing person or body from any source other than a newsman.

(b) A finding pursuant to subsection (a) of this section shall be made—

(1) in the case of a court, grand jury, or any officer empowered to institute or bind over upon criminal charges, by a judge of the court;

(2) in the case of a legislative body, committee or subcommittee, by the cognizant body, committee or subcommittee;

(3) in the case of an executive department or agency, by the chief officer of the department or agency; and

(4) in the case of an independent commission, board, or agency, by the commission, board, or agency.

(c) A finding pursuant to subsection (a) of this section shall be made on the record after hearing. Adequate notice of the hearing and opportunity to be heard shall be given to the newsman.

(d) An order of a court issuing or refusing to issue a subpena or other legal process pursuant to subsection (a) of this section shall be an appealable order and shall be stayed by the court for a reasonable time to permit appellate review.

(e) A finding pursuant to subsection (a) of this section made by a body, agency, or other entity described in clause (2), (3), or (4) of subsection (b) of this section shall be subject to judicial review, and the issuance of the subpena or other legal process shall be stayed by the issuing body, agency, or other entity for a reasonable time to permit judicial review.

SPECIAL LIMITATIONS

SEC. 5. (a) A finding under section [4] of this Act shall not in any way affect the right of a newsman to a de novo determination of rights under section 3 of this Act.

(b) If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of the invalidated provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

DEFINITIONS

SEC. 6. For the purposes of this Act:

(1) The term "information" includes fact and opinion and any written, oral, or pictorial means for communication of fact or opinion.

(2) The term "news" means any communication of information relating to events, situations, or ideas of public concern or public interest or which affect the public welfare.

(3) The term "newsman" means any person (except an employee of the Federal Government or of any State or other governmental unit while engaged in disseminating information concerning official governmental policies or activities) who is or was at the time of his exposure to the information or thing sought by subpena or legal process an operator or publisher of a news medium, or who is or was at such time engaged on behalf of an operator or publisher of a news medium in a course of activity the primary purpose of which was the gathering, compiling, composing, reviewing, editing, publishing, or disseminating of news through any news medium; and includes a freelance writer who has disseminated news on a regular or periodic basis to the public.

(4) The term "news medium" means any newspaper, periodical, book, other published matter, radio or television broadcast, cable television transmission, or other medium of communication, by which information is disseminated on a regular or periodic basis to the public or to another news medium.

(5) The terms "operator or publisher" mean any person engaged in the operation or publication of any news medium.

(6) The term "State" means any of the several States, territories or possessions of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.

Amend the title so as to read: "A bill to preserve the free flow of news to the public through the news media."

Mr CRANSTON. Mr. President, the revised text places main emphasis where it belongs, on the news and on the people engaged in preparing and transmitting news to the public. We have altered the long title, and earlier references to "information" have been changed to "news."

In addition, the amended bill places the focus of the unqualified, preemptive exemption squarely on those whose activities are indispensable to a well-informed public opinion—the men and women who are engaged in regularly or periodically disseminating news to the public.

WHOSE NEWSGATHERING IS PROTECTED?

Some people—especially in the media—are understandably wary of attempting to define "newsmen." So was I, at first. But it has become clear that a definition is absolutely necessary. There is a broad range of practical and philosophical reasons why this is so.

First, as a starting premise, the thrust of this bill is to exclude from adjudicative, investigatory, or regulatory truth-seeking proceedings, information and evidence that may be highly relevant and probative. Yet I believe that the public interest is generally best served by the fullest permissible gathering and airing of such information in these kinds of proceedings. Exclusion of such information or evidence should be granted only when exclusion serves a higher public interest. Because this entails a balancing of competing public interests, the ambit of exclusion of information and evidence, I believe, should be only as broad as is necessary to serve the underlying purpose of the exclusion—in this case—insuring that the free flow of news to the public is preserved and protected in the public interest.

So the test I have applied is: Who absolutely must be able to claim the exemption in order to guarantee a free flow of information that a democratic society must have to survive.

COURT CONSTRUCTION OF BROAD COVERAGE

Mr. President, a second factor in determining who is to be covered is the likely attitude of the courts. How would they construe a statute that would arguably permit any individual to lay claim to the exemption who could make a colorable showing of having been engaged in gathering data for the purposes of eventual publication. I do not believe most courts would be inclined to construe very broadly such a far-reaching application.

I think that quite properly courts instead would find ways of reaching what they consider "common sense" results. A statute that does not define "newsman" would thus invite courts to cut a wide swath of interpretation through the statute—either by construing away part of the substantive scope of the exemption, or by setting up judge-made standards to determine who is a "legitimate" or a "recognized" newsman. In either case, it is likely that the result would be far narrower protection than offered by our revised bill.

The net effect of enacting a statute without a "newsman" definition could very well be that protection would be denied in the very situations where Congress and the public would most want it applied.

OBJECTIVE STANDARDS NEEDED

Mr. President, we have thus sought to establish a set of guidelines for the courts to apply rather than allow judicial imagination to fashion their own. Our standard of regularity or periodicity of dissemination of news to the public sets up objective criteria discernible by material proof rather than findings of subjective intentions. And these criteria can reasonably be met by an extraordinarily wide range of press and media—professional and amatuer, "establishment" and "nonestablishment"—free-lance writers, other published authors, and book publishers, and people engaged in preparing and disseminating news to the public "on their behalf."

The standard of regularity or periodicity could be met, for example, by any one who enters into even a loose agency relationship to prepare an article or book manuscript for a publisher. Under the terms of the bill, this would be an "on behalf of" relationship. That relationship could be evidenced by such things as an exchange of letters agreeing on a particular story line and/or a right of first refusal. This practice of "querying" a publisher before writing or fully researching a manuscript is already common among free lancers.

The free-lance writer who has regularly or periodically himself disseminated news to the public in the past, but is not preparing a particular manuscript "on behalf of" a publisher, also clearly has met the definition in the bill.

Mr. President, I would agree that the protection in the revised bill is not so broad as to be coextensive with the freedom to publish as guaranteed by the freedom of speech clause in the first amendment. But it is not our purpose to extend this protection to everyone whose free speech is covered by the first amendment.

Our sole purpose is to restrict evidentiary testimony only to the extent that is required to ensure a free flow of information on to the public. The first-time, would-be author, who cannot enter into any "on behalf of" relationship with a publisher in preparing his or her manuscript still is free to publish.

This statute is not—heaven forbid—a licensing statute saying who can and who cannot publish; only who can and who cannot refuse to testify with impunity.

As long as so wide a group of newsmen as I have described can readily come within the coverage of the exemption in their news gathering activities, the public's need to know will be amply protected. And that must be the only test.

FIRST-TIME WRITERS CAN ACQUIRE PROTECTION

Mr. President, if the line is drawn in the law as we suggest, it is probable that publishers will be more willing than at present to enter into loose, but objectively determinable, agency relationships with first-time writers so as to make them eligible for the exemption.

We think this carefully drawn balance in terms of whose news-gathering is protected substantially strengthens the reach and protection of S. 158.

Next, we have revised the bill in order to provide the protection in the following circumstances, which were either uncovered or unclear under S. 158 as introduced:

IMPAIRMENT OF NEWS SOURCES OR NEWSMEN'S ASSOCIATIONS

Mr. President, clause 1 of the exemption in section 3 of the revised bill, regarding protection of the disclosure of news sources, has been expanded to encompass the compelling of testimony or the production of any document or thing that would reveal or impair any sources or source relations, associations, or information. This notion of impairment and the references to source relations and associations broadens the artificially narrow concept of confidential communications to include the ability of a newsman to gather information based upon the highly complex set of interrelating factors governing his relations and associations with potential sources of news.

WORKING NOTES AND OUTTAKES

Mr. President, clause 2 of the exemption in section 3 of the revised bill, regarding protection of notes, outtakes, and the general "work product" of a newsman, has been expanded to deal with the revelation of the content of published as well as unpublished information. This is done in recognition that in terms of the underlying concept for such protection, which is set forth in the revised congressional finding in clause 7 of section 2 of the revised bill—compelling such persons to present testimony or produce material or information which would reveal or impair a source or reveal the content of any published or unpublished information in their possession dries up confidential and other news sources and serves to erode the public concept of the press and other news media as independent of governmental investigative, prosecutorial, or adjudicative processes and functions and thereby inhibits the free flow of news to the public necessary to keep the public fully informed—applies equally to published as well as unpublished information and material maintained by a newsman.

Mr. President, the protection of material, even when it was previously published or broadcast, is essential to keep reporters from appearing to be an arm of the law. Otherwise, district attorneys might work less hard to press an investigation on their own if they knew they could lean on reporters to do their work for them. That is especially true if attorneys could get at a reporter's notes, tapes, and film.

Making a reporter's work products available to the Government would enable—indeed would seem to invite—the Government to set itself up as a super-snoop or super-editor, passing judgment on the accuracy or objectivity of the press. It is but one short, precipitous step from the Government as super-editor to the Government as super-censor.

INVESTIGATIVE AGENCIES' RELIANCE ON USING RESULTS OF NEWSMEN'S INVESTIGATIONS

Mr. President, I feel that if prosecutorial and investigative officials and bodies know that published information—such as the actual glossy print of

an uncropped photograph published in a newspaper or the actual video tape as broadcast on TV—will in all cases be available to them through subpena, they will place reliance on access to such information and limit their own independent investigative activities accordingly. I am not saying that, if the news media chooses to provide such published material voluntarily, it should not do so, but only that the predictability of the availability of such material by subpena tends to increase the likelihood of resorting to subpenas of such material.

I should point out that the use of the word "content" in clause 2 of revised section 3 is intended to permit some compulsory process for the purposes of authentication.

ALL PROCEEDINGS COVERED

Third. The scope of the exemption in section 3 of the revised bill is extended to cover proceedings before any local governmental entity as well as entities of the U.S. Government or of a State government.

Fourth. The scope of the exemption in section 3 of the revised bill is also extended to proceedings under the authority of a territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.

SEVERABILITY

Fifth. A severability clause is added—section 5(b)—to insure that if the application of any provision of the revised bill is declared invalid as applied to any particular person or circumstance, the remainder of the bill, and the application of the invalidated provision to others not similarly situated or to other circumstances, would not be affected by such an invalidation.

PRESUBPENA STANDARDS AND PROCEDURES

In addition, Mr. President, the revised bill includes a new section—section 4—establishing presubpena standards and procedures. I consider this procedure a major source of protection of news and news sources. Under this section, a subpena or other legal process to compel any testimony from a newsman or to require him to produce any document or thing could not even be issued until after certain findings have been made and certain procedures complied with, as follows:

BURDEN ON MOVING PARTY

First, the parties seeking to compel testimony or the production of a document or thing must carry the burden of demonstrating to the issuing person or body that—first, there are reasonable grounds to believe that the newsman has information not within the exemption set forth in section 3 and which is material to a particular investigation or controversy within the jurisdiction of the issuing person or body; and second, there is an underlying factual basis for the matter under investigation or the claim being asserted by the party in question; and third, the same or equivalent information is not available to the issuing person or body from any other source.

HIGH LEVEL DECISIONMAKER

Second, Mr. President, subsection (b) requires that the decision as to whether or not the moving party has carried the burden described in subsection (a) must be made by the highest authority within the issuing person or body: That is, by a judge of the court in the case of judicial or grand jury process; by the committee or subcommittee in the case of a legislative body; by the head of the department or agency in the case of an executive department or agency; and by the commission, board or agency in the case of an independent regulatory or administrative such body. This means, Mr. President, that the clerk of the court who is authorized to issue subpenas in civil cases under the rule 45(a) Federal Rules of Civil Procedure would not have this power as to a newsman.

NOTICE AND HEARING

Third, Mr. President, subsection (c) requires that the requisite findings under subsection (a) must be made on the record after a hearing and that the newsman in question must be afforded adequate notice of the hearing and an opportunity to be heard if he so wishes.

APPELLATE REVIEW

Fourth, Mr. President, subsections (d) and (e) provide for appellate review of decisions to issue or not to issue subpenas made by courts, and judicial review of such decisions made by other issuing persons or bodies, and requires that the actual issuance of subpenas be stayed for a reasonable time in order to permit such appellate or judicial review, in the appropriate State or Federal court.

POSTSUBPENA DE NOVO DETERMINATION OF APPLICABILITY OF EXEMPTION PRESERVED

Fifth, Mr. President, in order to insure that any determinations under the presubpena provisions of section 4 in no way constitute a decision which is considered res judicata or "the law of the case" with respect to the availability of the section 3 exemption—indeed, the issue would not be the same in any event since section 4(a)(1)(A) deals with a finding of "reasonable grounds" rather than a decision as to whether or not the section 3 exemption is in law applicable—section 5(a) specifically provides that a finding under section 4 permitting the issuance of a subpena or other process would not in any way preclude or limit the newsman's right to a full de novo determination of the applicability of the section 3 exemption.

EFFECT OF PRESUBPENA PROCEDURES

These presubpena standards and procedures, Mr. President, are designed to eliminate the issuance of a great many unnecessary subpenas to newsmen and thus also eliminate the considerable expense, substantial amounts of time, impairment in the eyes of the public, and needless controversy arising from any subpena to any newsman. Particularly important in this regard is the guarantee that the newsman be given notice in advance of the issuance of a proposed subpena and the opportunity to resist such issuance if he chooses, and his right to make his case in public rather than, for example, in the secrecy of a grand jury proceeding.

The effect of the presubpena procedural protections and standards put into the revised bill should be to make it a lot tougher on attorneys and prosecutors who are using subpenas to harrass reporters or to intimidate the news media.

Fighting a subpena can be a long drawn out, expensive proposition that can be particularly burdensome to small newspapers, periodicals, radio stations, or freelance writers.

Sometimes an attorney achieves his purpose of harassment or attempted intimidation just by obtaining a subpena, whether or not the reporter ever finally testifies. That practice has to be stopped.

Mr. President, it is also important that a reporter be able to prevent even the issuance of a subpena. In some cases, even his appearing to contest a subpena could destroy working relations with his news sources. This was the case with New York Times Reporter Earl Caldwell, who quite properly feared that his sources would dry up if he responded to a grand jury subpena; he would have had to go before them in secret session, and his sources would not know what he said about them, if anything.

I do wish to make clear, however, Mr. President, that a reporter could not successfully resist a subpena under the revised bill if the information being sought had been obtained while he was not working on a story.

CONSTITUTIONAL PREDICATE IN DECLARATION OF FINDINGS AND OF CONGRESSIONAL PURPOSE

Finally, Mr. President, the findings and declarations of purpose in section 2 of the revised bill have been redrafted with a view toward tightening them in terms of the succeeding provisions and terminology in the revised bill and in order to lay a predicate for the protection of "work product" in section (3) and to make the necessary underlying findings in terms of the authority of the Federal Government to preempt State law under the first and fourteenth amendments to the Constitution and under the commerce clause.

Mr. President, that concludes my explanation of the provisions of amendment Number 27 to S. 158. Now, I would like to turn to a more detailed discussion of the need for prompt passage of S. 158 as amended.

NEED FOR PASSAGE OF S. 158, AS AMENDED

Mr. President, as a former news wire correspondent, as a public official, and as an American citizen. I feel strongly that the news media and the press need and should have maximum legal protection to meet their responsibilities in a free and open society.

The first amendment is not a piece of special interest legislation for the news and publishing industries, it is a governmental guarantee to a free people without which they could not remain free for long. The working press of our Nation must be able to protect its sources of information if it is to continue to expose corruption and lawlessness in and out of Government, in high places and low.

For a society to be truly free, Mr. President, it must have a press that is truly free. One of the fundamental services that a free press renders to a free people is to watchdog the various levels of Government, the officialdom and the bureaucracy who handle the peoples' money and who wield awesome powers over people's lives, freedoms and property.

But what would happen to investigative reporting, what would happen to advances toward truth and probity in public life which result from fearless investigative reporting, if newsmen could not guarantee confidentiality to their news sources?

It is generally recognized that these sources would dry up. That drying up constitutes a danger to our free press and, more importantly, a danger to our free society. Without an ironclad assurance of anonymity, many people with vital information that should come to public attention simply would not talk.

INSIDE INFORMANTS NEEDED

Mr. President, that is not surprising. When public or private power is abused it is often abused secretly. As a police department often must depend on a tip to solve a crime, so an investigative reporter often must depend on a knowledgeable, inside informant to be able to discover abuses of power and bring them to public attention. But informants who fear for their jobs—and sometimes for their lives—rarely divulge incriminating information unless they feel sure that their identity will be kept secret.

As Timothy Leland, Pulitzer prize winning assistant managing editor of the Boston Globe wrote me:

> Reporters, unlike law enforcement agencies, are not able to subpoena public records, which makes the job of exposing public corruption and malfeasance infinitely more difficult. Confidential sources are the most important tool in a reporter's workshop. To jeopardize this advantage is to handcuff the news media in one of its most important functions.

That inescapable fact is further documented by the replies I received from a number of Pulitzer prize winning investigative reporters whom I surveyed for their views on the importance of confidentiality.

Let me read you just two of them, Mr. President.

Al Delugach, who is now with the Los Angeles Times, won the Pulitzer prize in 1969 when he wrote a series of articles for the St. Louis Globe Democrat exposing fraud and corruption in the St. Louis Steamfitters Union. Here is what he wrote to me about the importance of confidentiality:

I cannot over-emphasize the importance to me, in 21 years as a newspaper reporter, to have confidential sources. Almost any important story involves such sources. Even though it may be that none of the information from such sources is used directly in a story, invaluable leads and background information usually are obtained. The confidential source is usually someone in a rare position to know something significant (from the public standpoint) that is going on inside a government agency or organization.

Almost by definition, a confidential source is one who does not desire to have—and often cannot afford the risk of having—his identity become known to his superiors or associates. Whether he is acting from altruistic or selfish motive, the source usually reveals information only with a guarantee of anonymity. Without it, the source cannot be a source. Often there is no substitute for a confidential source. In his absence, valuable information is lost to the public, and it may not be possible to have a story at all . . . .

I feel that some of the very best sources of newsmen would dry up if a guarantee of protection could not be given—and made credible. If it became common to force newsmen to disclose sources, I believe there would be widespread fear of disclosing important facts to newsmen by persons in the circumstances I have described.

I think investigative coverage of many vital areas of public information will suffer grievous shrinkage unless legal protection is forthcoming to counteract the recent Supreme Court decision.

OFFICIAL COLLUSION EXPOSED

William Jones of the Chicago Tribune won the Pulitzer Prize for investigative reporting in 1971 for exposing collusion between police and some of Chicago's largest private ambulance companies to restrict services in low-income areas.

Mr. President, here is what he wrote to me:

I cannot stress strongly enough the importance of confidential sources to investigative reporters. Without them we would be hamstrung to the point where many investigations would never get off the ground. I think it should also be stressed that the term "confidential source" as it is used in investigative reporting is not a synonym for the kinds of characters portrayed in dime spy novels.

It has been my experience that most confidential sources are people who see something wrong or corrupt in the public or private agency where they work and merely want the problem corrected. It is usually their first time in dealing with such a situation and they arrive at the door of the investigative reporter only after exhausting every effort within their own agency to bring about changes. They are people with kids and mortgages and pride in the job they do, not plotters and spies seeking to topple governments or agencies.

Anonymity is essential. It is frequently the first question asked by a potential confidential source in the first telephone conversation. If you can't guarantee it you will probable never hear from the source again. There are a number of reasons for this and from personal experience I could recite examples that range from murder threats to firing and professional blacklisting. I might add that all too often when an agency is hit with a scandal that appears to be the result of confidential sources they frequently devote more time to trying to find the source than correcting the abuses.

THE PUBLIC BENEFITS FROM INVESTIGATIVE REPORTING

What kinds of stories do investigative reporters write? What are the results of these stories? Who benefits?

KNX radio in Los Angeles, explaining that both their news and editorial departments rely on confidential sources, lists some recent editorials which, they say, would not have happened without a confidential tip to start with. These editorials included:

An illegal appointment to the city planning commission.

An alleged financial flimflam behind the Los Angeles Convention Center.

The details of the land swap that suggested a secret deal between city hall and an oil company.

The unfair and illegal destruction of a park.

The exploitation of a tribe of Indians by some judges, lawyers, and a major bank.

The parking ticket mess that jails innocent people in Los Angeles.

The beating up of a student editor by the UCLA student body president.

The threats made against police officers by a group of professors.

The attempt by an assemblyman to create a new assembly district for one of his friends.

ONE HUNDRED AND NINETEEN INDICTMENTS IN BOSTON

In its first full year of operation, the Boston Globe's four-man investigative team published reports that resulted, among other things, in:

119 indictments against 27 people, including three former city mayors and a city auditor:

Passage of legislation requiring the State Turnpike Authority to put all projects out for competitive bidding;

A probe of scandalous land speculation in another Massachusetts city by the District Attorney's office.

None of these investigative reports—and the beneficial results that ensued—would have been accomplished without help from confidential sources.

Mr. President, Newsday conducted a 3-year investigation and expose of secret land deals in eastern Long Island which led to a series of criminal convictions, discharges, and resignations among public and political office holders in the area.

The recent CBS Special, "The Mexican Connection," revealed narcotics smuggling practices which enabled the Government to more effectively curtail those practices.

Two reporters and a photographer for the Philadelphia Bulletin exposed collusion between police and numbers racket operators.

David Burnham, of the New York Times, exposed widespread police corruption in that city and initiated the present departmentwide cleansing of criminal influences.

YABLONSKI MURDER CLUES

It was newspaper stories that produced the clues that led to arrests in the Yablonski murder case.

The Riverside California Press Enterprise won the Pulitzer Prize a few years ago when it exposed corruption in the courts in connection with the handling of property and estates of a local Indian tribe.

And here, Mr. President, is a 5-year record of revelations of widespread corruption in government by the Los Angeles Times, revelations which, in the editors' own words:

Depended heavily on the trust placed in Times reporters by hundreds of news sources.

In 1967, an investigation of a proposed World Trade Center on Terminal Island led to a grand jury inquiry and the indictment of four commissioners.

In 1968, an investigation of the Recreation and Parks Commission resulted in the indictment and conviction of a commissioner.

In 1968, an investigation of the Rapid Transit District led to the indictment of two men who had arranged the sale of surplus equipment at a cut-rate price.

In 1969, an investigation disclosed that a Los Angeles city planning commissioner and the city planning director had joined a group of developers and had bought land for speculative purposes on the site of a proposed airport at Palmdale.

In 1969, an investigation disclosed irregularities in the Beverly Ridge Estates development financed by Teamster Union pension funds in the Santa Monica Mountains.

In 1971, an investigation disclosed waste and mismanagement in the development of the Queen Mary as a maritime museum.

And last June, an investigation disclosed speculative land investments based on inside information by Anaheim's city manager and public works director who played key roles in planning public works that boosted the value of their property.

MEDIA SUPPORT

Scores of newspapers, radio, and television stations have sent me copies of editorials they have written or broadcast in support of my bill—from the Daily Star in Tuscon, Ariz. to the Evansville Courier in Indiana, from the Lewiston Daily News in Montana to the Long Island Free Press in New York. Without exception, every one of them expresses in its own words the emphatic opinion of the Vicksburg, Miss. Post:

If the media is required to divulge the source of information sought out, and received through confidential sources, it follows this type of information would not be forth-coming.

What that would do, warns the Contra Costa Times in California, "is literally dry up our news sources and make it all but impossible to keep the public informed about the actions of the instruments the people themselves have created—government."

And the Norristown, Pa. Times Herald notes Mr. President, that—

If the courts and the Congress are allowed to subpoena at will the notes of a journalist, it will be the end of the free press and, in the end, it will be the public who will suffer most.

Robert Fichenberg, chairman of the Freedom of Information Committee of the American Society of Newspaper Editors, warns:

It would take only a few instances of forced disclosure at the federal level to set in motion a nation-wide chain reaction of timidity and reluctance among potential sources.

That "chain reaction of timidity" may already be underway. Brit Hume cataloged in a New York Times article last December instance after instance of inside-the-government informants choking up, if not drying up, for him and other newsmen. This is a case of no news being bad news. What we do not know will hurt us.

WHITE'S VIEW DIFFERS

Significantly Mr. Justice White's opinion for the Court in the Caldwell case projected just the opposite result of a failure to protect news sources. He said:

Reliance by the press on confidential informants does not mean that all sources will in fact dry up because of the later possible appearance of the newsman before a grand jury . . . There is little before us indicating that informants whose interest in avoiding exposure is that it may threaten job security, personal safety, or peace of mind, would in fact, be in a worse position, or would think they would be, if they risked placing their trust in public officials as well as reporters.

In fact, the experience of the last 7 months indicates Justice White was not correct on the facts of the situation. I think that is a significant development. Congress can discover the truth as to whether news sources are indeed drying up. And based on independent, comprehensive findings, Congress can then take appropriate legislative action.

Mr. President, the Court's opinion also makes much of the point that though there has never been a Supreme Court holding that news sources were protected,

sources were not reluctant to come forward with confidential information in the past. This, I must say, respectfully, misses the point. Most of the reporters, broadcasters, publishers and private citizens with whom I have talked had generally asusmed prior to the Caldwell decision that such a constitutional protection was implicit in the first amendment freedom of the press clause. It was the Court's holding to the contrary which opened wide a door which had hitherto been widely understood to have been locked.

Mr. President, newsgathering is an obvious prerequisite to news publication or broadcast. Consequently governmental action that has the effect of restricting newsgathering by drying up news sources is, in a real sense, a form of prior restraint on the press—a practice most Americans look upon with abhorrence.

Informants will be encouraged to talk to the press only if the law that Congress designs to protect them against involuntary disclosure is as broad as possible and simple enough for anyone to understand. For if the law is neither broad nor easy to understand it will likely turn off rather than encourage news sources. That, I am afraid, will be the result if any of the qualifications proposed in other bills now before the subcommittee are enacted into law.

WEAKNESSES OF SOME OF THE QUALIFICATIONS PROPOSED

Mr. President, read some of the qualifications that have ben proposed, singly, or in combination and consider: How many potential informants will be eager to talk to the press once they realize that

the reporter may be compelled to testify if there is probable cause to believe that the information they give him is clearly relevant to a suspected crime? Or that the evidence is unavailable or not readily accessible elsewhere? Or that the information must be exposed in open court to prevent a miscarriage of justice? Of because of compelling and overriding national interest or for reasons of national security?

We all know that the Government of the United States can invoke national security almost any time it wants to. And in most cases make it stick.

Such qualifications could open up loopholes that would destroy the very protection we are trying to extend. Qualifications such as "national security" or "threat to human life" would be self-defeating.

A member of an espionage ring would not likely tell what he knows to a newsman if he knows the reporter may be compelled to identify him to the authorities. As a result of his silence law enforcement officers themselves will not have the benefit of the information he might otherwise have disclosed.

And if the identity of a member of the Mafia is ever revealed in court because he tipped off a reporter to a planned murder, it will probably be the last time that a member of the Mafia—or anyone else who does not want to be "fingered"—tips off a reporter to a murder.

ENCOURAGE TIPSTERS

Mr. President, the worse the crime we want to prevent or to solve—kidnaping, murder, political assassination, espionage—the most important it is that Congress produce legislation that will encourage tipsters to tell the press what they know about these crimes. Otherwise the information we need the most is the very information we will no longer receive.

Moreover, what constitutes a threat to human life? Is bad meat sold to the public a threat to human life? Last July, William Avery, news director of channel 13, in Springfield, Mo., wrote to tell me about substandard meat processing plants in the State which the station's reporters had learned about through confidential sources. The station broadcast the story.

If the "threat to human life" exception applied in this case, as well it might, Mr. President, then the station's newsmen could be compelled to identify the source of their story. With that precedent, how many others would dare tell a newsman about unwholesome conditions in a food processing plant in the future?

Thus an exception probably meant to apply to cases where killings may be involved could easily spill over to cover instances of bad food which might cause illness or death. Similarly, this in turn could extend to product safety or any kind: automobiles, flammable clothes, or unsafe power tools used in the home. A worker in a factory might not dare reveal to a newsman that the power saws his plant produces are defective for fear that his identity would be revealed in court and he would lose his job.

Most people will not read the law, of course, Mr. President. But they will read of reporters and their informants caught in its web. When silence is so much safer, few potential informants will be willing to take their chances of emerging unscathed from the vague and uncertain legal maze created by a qualified protection.

DEFAMATION

Mr. President, a number of pending bills propose a total exemption for defamation cases. I believe that such a blanket libel exception would create so huge a loophole as to destroy the very protection we are seeking to create.

The rulings in the New York Times and Rosenbloom cases require plaintiffs in "public figure" or "public interest" defamation suits to prove malice on the part of the news media when the media has disclosed alleged corruption or wrongdoing. As a result, it is now extremely difficult for the "public" plaintiff to win a defamation award, or even to resist summary dismissal of his case.

But a blanket libel exception in these kinds of cases would in effect give "public figures" a concrete, albeit illegitimate reason to bring libel actions against the media. Though the public official would stand little chance of winning his suit, he would be able to force the newsman to disclose the confidential news source who "blew the whistle" on him.

A blanklet libel exception clearly offers far too great an opportunity for abuse.

PREEMPTION OF STATE LAW

Mr. President, I also want to focus on the absolutely paramount need for a Federal statute which extends to all non-Federal proceedings. There is a strong practical need for uniformity in this area to preserve the public's need to know. A Federal statute applying only to Federal proceedings offers little assurance to a potential news source who knows that the newsman can be subpenaed and compelled to reveaf in a State or local proceeding the informer's identity or certain information he has given in confidence.

I do not believe we can afford the luxury of waiting for each of the remaining 31 States to act in this field. Nor can we expect them to enact a uniform law any more than the 19 States which already have a wide variety of news protection legislation.

Mr. President, for the channels of confidential communications to be effectively reopened, newsmen and their sources must know with reasonable certainty what the rules are as to a subpena issuing under either State or Federal authority. It is also important to stress that news flow clearly is a national occurrence. And that we in Washington, D.C., for example, need to have the fruits of the confidential relationships—and the information flowing from such sources—which the press may have established in San Diego, Chicago, Philadelphia, or wherever. News, and the public's need to get the news, knows no State boundaries.

OTHER TESTIMONIAL PRIVILEGES WORK

Mr. President, an attorney cannot violate the canons of ethics and break a confidence with his client even to prevent the conviction of an innocent man or to disclose a breach in national security. Yet we do not hear demands that the attorney-client privilege be "qualified" to compel a lawyer to testify when he has that kind of information. Nor do we hear that either our system of justice or the survival of our Nation is in jeopardy because that privilege is not qualified.

A doctor also cannot be compelled to break a confidence with his patient. But it is accepted that he will violate his Hipocratic Oath and disclose confidential information about his patient if, in his professional judgment, disclosure is necessary for the public safety or to protect his patient's life.

A reporter must also have this double set of freedoms: freedom from compulsion and freedom to follow the dictates of his conscience, his commonsense, his loyalty to his country and, most cogently, freedom to exercise his professional judgment. The reporter alone is competent to determine if breaking his pledge of confidentiality in a particular case will harm future relations with his sources and so diminish or destroy the services he can continue to render the public as an investigative reporter.

Many people consider the press a kind of unofficial ombudsman of our constitutional system. Many have learned that it is sometimes necessary to get press publicity as a prod to those in authority to take action against wrongdoers. In most such cases, the only alternative to public disclosurer is continued cover-up. That is perhaps why prosecutors in States with so-called newsmen's shield laws told a New York Law Revision Commission that those statutes actually help them in law enforcement. A number of State attorneys general and other law enforcement officials agree completely.

UNFETTERED PRESS

Mr. President, I believe that an unfettered press is basic for law and order and justice in a free society. I am equally convinced that an unfettered press is basic for a criminal defendant to have the protections that the Founding Fathers envisioned when they insisted on his constitutional right to a "public trial."

Mr. President, I believe that a defendant has more to fear from secrecy in his trial proceedings than from press coverage, more to fear from a star chamber than from a 5-star edition.

First is literally first, Constitution-wise. The Court has time and again ruled that first amendment rights like the right of free speech and free press enjoy preferred status. First amendment rights must be given greater weight whenever they come into conflict with other Bill of Rights guarantees.

That is simple logic, as far as I am concerned. For if first amendment rights did not exist, most of the rights enumerated in the other nine amendments would be empty rights; they would offer little consolation to a people intellectually enslaved.

SELF-DEFEATING NOT TO GIVE PROTECTION FROM COMPULSORY PROCESS

Mr. President, if newsmen are compelled to testify about criminal information they may possess, most if not all of them will soon cease to be recipients of criminal information and so, having nothing to testify about, will no longer be subpenaed. That may be one way of resolving the current controversy, but it is not the way I recommend in the public interest, or in the interest of law and order and justice.

UNDESIRABLE SIDE EFFECTS WITHOUT WORK PRODUCT PROTECTION

Mr. President, many undesirable side effects also will occur if newsmen's files, notes, and "work product" are available upon subpena to prosecutors, investigators, and others.

People who normally deal with the press openly, in a straightforward manner will become more guarded and more reticent once they realize that something they say may involve them in a criminal investigation. And finally investigators will tend to rely on newsmen's investigative work rather than pursue their own.

The news media will consequently take on the image of being part of, rather than distinctly separate from, official governmental processes and the authority of the state. Press credibility will suffer. Worse yet, if the Government can subpena the media's notes, tapes, film, and outtakes, it can easily set itself up as a kind of supereditor, passing judgment on the accuracy and objectivity of the gathering, editing, and publication of news. It is but one short precipitous step from the Government as supereditor to the Government as supercensor.

HISTORICAL PERSPECTIVE

But by no means does everyone favor congressional action at this time. If ever.

Mr. President, the administration, though reluctantly willing to accept some qualified bill, thinks the press should put its trust totally in the self-restraint of the Justice Department and rely on the Attorney General's guidelines. Those are the guidelines which the Attorney General's Office imposed on itself in August 1970 in response to a growing concern of the news media.

SPATE OF SUBPENAS

That concern arose from a spate of Federal grand jury subpenas earlier that year. They included subpenas served on Time, Life, and Newsweek; the four major newspapers in Chicago, and the now famous subpena for Earl Caldwell of the New York Times, which led to last June's landmark decision. During 1969–70, the networks were served more than 150 subpenas.

In my opinion, Mr. President, the Attorney General's guidelines are a rather shaky staff for an independent press to rely on. True, they restrict somewhat the use of the subpena power against newsmen. But only somewhat. And only for as long as any particular Attorney General wishes to keep them in effect. Worse yet, the guidelines implicitly legitimize governmental powers over a free press which, in my view, the Government should not possess.

Much more credible to me, Mr. President, is the fear expressed by some members of the press that looking to the legislature for protection is a risky business. They accurately note that "what Congress gives, Congress can take away." These newsmen prefer the path recommended by one publication that warned that the press can "only put its trust in the first amendment pure and clear, and plug away at getting the whole truth and nothing but the truth."

VOID CREATED BY CALDWELL CASE

Unfortunately, Mr. President, the first amendment became considerably less pure and clear for press purposes, thanks first to the Caldwell decision, and then to the Court's refusals to review the imprisonment of Bill Farr in California, and Peter Bridge in New Jersey. So despite the opposition of some members of the press to congressional action, it is now apparent that unless Congress does act, strongly and clearly, to fill the first amendment void created by the Caldwell decision, our press freedoms will be still more seriously eroded as lower courts apply the Caldwell holdings in more and more cases.

Some newsmen believe that the best way to get the Government and the courts to back down is for more reporters to choose jail rather than violate a confidence. To quote their reasoning:

> They can't put us all in jail. And besides, it will prove to informants that reporters won't break their word.

Most newsmen would agree, however, Mr. President, that the sight of a newsman being carted off to jail is more likely to shake up a news source than reassure him. And it is less than a sure bet that Government prosecutors are going to be deterred even by a succession of sacrificial lions behind bars.

I agree with attorneys for the Washington Post and Newsweek who hold that—

> The preservation of an institution as important to our form of government as a free press should not and must not depend upon the willingness of newsmen to go to jail.

The current debate for the most part has centered not on whether Congress should pass protective legislation, but rather on what should be the nature and sweep of that legislation.

Who and what should be protected? Under what conditions? Indeed, should there be any limitations, or should the ban against compulsory disclosure of confidential news sources and information be total and unqualified?

ABSOLUTE BILL NEEDED

Mr. President, I believe that a broadly embracing and absolute protection is needed to insure that the public gets the information it must have in a democratic society. It is my view that Congress' aim should be to protect explicitly by statute all of the newsgathering rights which many people had all along assumed were implicit in the first amendment—until the Court told us otherwise.

Intelligent self-government requires a vigorous, robust press that will develop confidential leads and follow them up. It demands fiercely independent, unintimidated news media that probe and investigate, question and criticize, and so shed the daylight of public exposure on every shaded or shady area of public life.

It also demands a press that is more than an uncritical conduit for public pronouncements. Today's in-depth, interpretive reporters make frequent use of confidential information to help them verify and evaluate the on-the-record "news" they get from official sources. Much that is handed out as news these days is superficial, sometimes deliberately misleading, and almost always self-serving.

Mr. President, if a self-governing people are to govern themselves wisely and well, their Government must encourage the fullest possible freedom for them to speak their minds; the Government should encourage the people's freest possible access to information and opinion by which they may enlighten their minds. The two are inseparable and interdependent.

PRIVILEGE CHARACTERIZATION IS A MISNOMER

Though some people talk in terms of a newsman's privilege, that is a misnomer, Mr. President. The newsman merely exercises the privilege on behalf of the public. The public itself is the beneficiary. Congress must act to protect the public, not merely the newsman and his source.

Mr. President, my bill protects the public, not the press. It protects the public's right to know and the public's need to know. It protects the public's right to know about scandals in government and business. It protects the public's right to information which will lead to the conviction of criminals. It also protects the public's right to hear views and opinions which may displease those in authority.

For a press to meet its responsibilities in a free society, the Columbia Missourian declared:

> It needs all possible freedom from governmental controls. The pluralism of ideas, the intensity with which they are expressed, the constant battle for minorities to be heard or survive and the respect for individual rights this country represents make such a freedom guarantee not only possible but mandatory.

The Missourian concluded—as shall I—

> In a dynamic democracy like ours, a press must be absolutely free from governmental controls to function in its ascribed role—there is no realistic compromise about that.

CONCLUSION

Mr. President, I can think of no single issue pending before Congress or the Nation at this time which more fundamentally affects the delicate balance of our democratic process. The public's right to know—more to the point, the public's need to know—is dependent on the ability of the press to protect all of its information and all of its sources of information.

INTRODUCTION OF THE FREE FLOW OF INFORMATION ACT

Mr. KENNEDY. Mr. President, it gives me great pleasure today to join the Senator from California (Mr. CRANSTON) in introducing the Free Flow of Information Act, designed to preserve the free flow of news and ideas to the public through the news media. As stated in its initial section, this bill like the first amendment, is based on the premise that a fully informed public is essential to the maintenance and effective operation of our democracy. The provisions of this bill follow logically from our conclusion that compelling newsmen to reveal a source or the content of information in their possession inhibits the free flow of news to the public.

Our proposed legislation would provide newsmen with an absolute and unqualified privilege from compulsory process in both State and Federal forums, and it includes procedural safeguards to effectuate this protection. Last month the Constitutional Rights Subcommittee opened hearings into the need for newsmen's privilege legislation. After listening to and reviewing the testimony presented, I became more resolute in my determination to secure the most complete protection for newsmen. The Justice Department subpenas for Jack Anderson's telephone records and the spate of civil subpenas issued to newsmen who covered the Watergate case—both occurring after the Senate hearings opened—drove home the compelling need for prompt action on this legislation.

There are four important features of the bill being introduced today. First, it affords newsmen protection without qualifications or loopholes. This reflects our belief that anything less than blanket protection would prove inadequate to fulfill the purposes and objectives of the legislation. Observed Mr. Justice Douglas:

> Sooner or later, any test which provides less than blanket protection to beliefs and associations will be twisted and relaxed so as to provide virtually no protection at all.

I concur with this observation.

Second, our bill applies to both State and Federal proceedings. Certainly citizens in every State should enjoy an equal right to the fruits of a free and unfettered press. Likewise, newsmen in every State must have the same protection if they are to provide the public with those fruits. The excellent legal analysis provided by witnesses to the Constitutional Rights Subcommittee appear to me persuasive as to Congress' constitutional power to preempt State laws in this area.

Third, our bill covers legislative and administrative, as well as judicial, proceedings. Society's interest in preserving a free flow of information to the public should remain paramount despite the nature of the proceeding from which threats to the press may emanate. Before all forums the newsman must remain equally protected if he is to have any viable protection at all.

Finally, the bill contains presubpena safeguards in section 4 to provide a screen for unnecessary or harassing subpenas, while at the same time insuring that the newsman will remain amenable to process in his private capacity. The procedures, though appearing complex, merely serve to place the initial burden where it belongs—on the party who would compel testimony or presentation of documents, and not on the newsman himself.

Mr. President, I have more fully elaborated my views on the subject of newsmen's privilege legislation generally in my statement at the opening of the Senate hearings last month. I thus ask unanimous consent that my statement be included in the RECORD at this point.

There being no objection, the statement was ordered to be printed in the RECORD, as follows:

STATEMENT OF SENATOR EDWARD M. KENNEDY

Mr. Chairman, I commend you for initiating these hearings on the rights of reporters, and I hope that our Subcommittee will give the pending legislation the high priority it deserves. Of all the great principles on which our nation was founded, none is more important than freedom of the press under the First Amendment, and none is under greater attack in the nation today.

Not since the Alien and Sedition Acts nearly two hundred years ago has freedom of the press been as ominously threatened by the heavy hand of government as it is at the present time. It is not too much to say that we have a crisis before us, a crisis over the First Amendment, and the way we resolve that crisis in the coming months will have profound effects on the future of our country and all our other basic freedoms.

The right of the public to know and the right of the press to represent the public are twin pillars of our heritage. Any attempt to impose conditions upon this right strikes at the very core of our democracy—the right of the people to have access to the information which affects their lives. This is why I am pleased to give my support to federal legislation providing newsmen with an absolute and unqualified privilege from compulsory process in both state and federal forums.

We know that Congress is very much alone in the current struggle. Last June the Supreme Court turned a deaf ear to pleas that the Constitution itself is sufficient to protect reporters from being required to disclose their notes and sources to a grand jury. And, the Executive Branch professes to see no danger worthy of legislation in the present crisis.

For nearly two hundred years, reporters and prosecutors have coexisted without the need for such legislation. In fact, throughout our history, reporters have enjoyed a *de facto* privilege from subpoena in grand jury proceedings, a privilege of the sort consistently afforded to doctors, lawyers, priests, husbands and wives, and others whose special relationships of confidentiality have long received generous protection of society.

Today, under the present Administration, all that has changed. Spurred on by the Vice President's persistent attacks on the press, by the Pentagon Papers Case, and by a series of other government-inspired assaults on the First Amendment, the traditional freedom of the press has been seriously undermined, to the point where reporters now find themselves fair game for any aggressive or unscrupulous prosecutor armed with a fishing license stamped "subpoena."

We know the mushrooming dimensions of the problem. In recent months, numerous reporters have been subpoenaed to reveal their sources or notes. Several reporters have gone to jail for contempt, for refusing to deliver such material. Overall, we know that editors and reporters are developing serious reservations about publishing information that might bring grand jury repercussions on them, and their sources are afraid to talk.

Thus, a range of deeper problems is emerging, the consequences of which we cannot even begin to evaluate. A growing number of men and women who know of wrongdoing, who know of corruption, or who know of questionable policies, are now deciding not to call reporters, because they no longer trust the reporters' ability to keep their identities hidden. Editors and newsmen are giving second thoughts to publishing and revealing information, for fear that such disclosure may bring swift and frightening retaliation by government. And, because of these fears, there is the very real problem that the public is now being denied the enlightening fruits of the truly free press envisioned by the drafters of the Bill of Rights.

My own view is that the current situation is so serious that Congress should not hesitate to enact the broadest possible legislation designed to give newsmen an absolute and unqualified privilege from subpoenas to disclose their notes and sources. The privilege should apply to all jurisdictions, federal, state and local, and to all branches of government, Legislative, Executive or Judicial.

The logical progression from the First Amendment to the need for a secure newsman's privilege was clearly described by Justice Potter Stewart in his opinion dissenting from last summer's distressing Supreme Court decision rebuffing the claim of a constitutional privilege for newsmen. Justice Stewart wrote:

"We have held that the right to publish is central to the First Amendment and basic to the existence of constitutional democracy. . . .

"A corollary of the right to publish must be the right to gather news. . . .

"The right to gather news implies, in turn, a right to a confidential relationship between a reporter and his source. . . ."

The fears of potential news sources that their identities may be revealed are well-founded. Not only loss of job, but even loss of life, may follow from disclosure of the source. Even irrational fears of disclosure, if the newsman's source is not fully protected may suffice to inhibit the flow of information into the hands of the press and ultimately the public. Thus the confidential relationship is often necessary if the reporter is to receive his documents or tips in the first place.

We know there is a close relationship between excellence in journalism and the reporter's need for confidentiality. Outstanding examples are the Pulitzer Prize-winning stories by Neil Sheehan of the *New York Times*, bringing the Pentagon Papers to public light; by Jack Anderson making public disclosure of the documents of the National Security Council dealing with India and Pakistan; and by the *Boston Globe's* Spotlight Team of reporters, who exposed corruption in city government. All of these stories originated with information or documents from confidential sources, and were heavily dependent on those sources. The list goes on and on—other dramatic recent examples include the George Polk Memorial Awards to the Associated Press' Jean Heller for the story on the Tuskegee Syphilis Scandal, to Carl Bernstein and Bob Woodward of the *Washington Post* for their coverage of the Watergate Affair, and to Ron Kessler of the *Washington Post* for his series on hospitals. All these reports saw publication only because sources agreed to reveal information in confidence to able investigating reporters. Confidential sources also were indispensible to Frank Wright of the *Minneapolis Tribune* and James Polk of the *Washington Evening Star News*, who received the Worth Bingham Prize and the Raymond Clapper Memorial Award for stories on campaign contributions.

And those are only the tip of the iceberg—the stories that made national headlines. What about the countless daily investigations of local issues by local reporters?

How many stories will never be born because a source feels insecure in the face of the Supreme Court's decision and the threat of a prosecutor's subpoena? A few years ago, the Wall Street Journal estimated that 15 percent of its stories were based on confidential information. The Christian Science Monitor has predicted that its percentage may go as high as 50 percent.

How much will be lost to the public because CBS News could not assure a welfare mother of anonymity? Because Paul Branzburg's editors became nervous about his continuing series on drug abuse? Because a key source in an official corruption story being developed by a Baton Rouge reporter feared a subpoena threat? Because Earl Caldwell's tapes and notes on the Black Panthers were destroyed? Because crucial informers were afraid of being revealed as sources for the Boston Globe's Spotlight Team reports?

The answers will never be known. But the danger is obvious. The less informed we are, the less ability we have to protect ourselves from corruption of government officials, from the unresponsiveness of our institutions, and even from violent crime.

In part, of course, the rash of press subpoenas in grand jury and criminal cases in recent months is a symptom of lazy law enforcement. Effective investigative work is a difficult and demanding job. With all the vast resources available to law enforcement agencies today, I see no need whatever to allow a situation to continue in which reporters are forced into the role of unwilling investigators for state prosecutors or local district attorneys, or in which the National Press Building becomes simply the Fourteenth Street Annex of the F.B.I.

In the current debate, nothing is more misleading than the suggestion that the real question should be framed as a choice between combatting crime or protecting news sources. The question is not whether we shall have privileged news or unprivileged news, but whether we shall have privileged news or less news. The public, as it watches television, listens to the radio, and reads its magazines and newspapers, will be the greatest loser if the news media are compelled to perform their vital role under the current oppressive atmosphere.

Doctors and patients, attorneys and clients, priests and penitents, husbands and wives—all have protected relationships under the law today. Indeed, it is safe to say that relevant information in criminal proceedings is often lost to prosecutors because of these protections. But society has decided that the need for candor and trust and openness in these relationships is more important than any need that prosecutors may have for the information these privileged groups possess. The same should be true for reporters.

The Constitution recognizes that a free and robust press is central to our liberty, and it is up to Congress to act to keep that guarantee secure.

As I have indicated, I believe that the legislation we enact should contain an absolute, unqualified privilege. As Professor Paul Freund of the Harvard Law School has stated, "It is impossible to write a qualified newsman's privilege. Any qualification creates loopholes which will destroy the privilege." However well-intentioned such qualifications may be, they risk the result that they will weaken the First Amendment, and that Congress will simply be rubber-stamping the current practice. As Justice Douglas wrote:

"Sooner or later, any test which provides less than blanket protection to beliefs and associations will be twisted and relaxed so as to provide virtually no protection at all."

Any aggressive prosecutor, for example, or any determined judge, could easily shift to a newsman the burden of resisting subpoenas under a qualied privilege law. We cannot take this risk. We cannot afford to gamble with the First Amendment by enacting a law that confers less than a privilege that is absolute.

Further, as I have also indicated, the bill we enact should encompass state as well as federal proceedings. Citizens in every part of this nation have the same rights to information, and newsmen everywhere should enjoy the same protections. Legislation applying only to federal proceedings would be a sham, since it would leave a gaping hole in the protection reporters need.

These principles and objectives have been advanced by Davis Taylor, publisher of the *Boston Globe* and the American Newspaper Publishers' Association. They are presently contained in S. 158, as introduced by Senator Cranston.

In the course of these hearings, I am sure that these principles will be improved and refined, but we must be vigilant to insure they are not weakened. After all, what is at stake is not just the rights of reporters, but the rights of all of us, the right of the American people to know the news—not just the news contained in government press releases, but all the news.

Mr. KENNEDY. Mr. President, there will be 2 more days of hearings on newsmen's privilege legislation next week, and I hope that the provisions of this bill can be explored there further.

Senator CRANSTON has provided a full and detailed explanation of the bill in his statement, and he makes a most compelling case for its enactment. I am pleased to be associated with his efforts on this issue, which have been marked throughout by vigor and persistence, as well as by insight and dedication.

I also want to commend the chairman of the Constitutional Rights Subcommittee, Senator ERVIN, for his commitment to the principles of the first amendment, which is reflected in the attention he has given this subject.

I hope that this Congress will act to provide the protection needed to maintain the vigor and freedom of our press and ultimately to preserve the people's right to know.