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# The Nervous Breakdown of the First Ammendment

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"THE NERVOUS BREAKDOWN OF THE FIRST AMENDMENT"

". . . in some areas of the law it is easy to tell the good guys from the bad guys. . . in the current debate in the broadcast media and the First Amendment . . . the answers are not easy."

J. Skelly Wright  
U. S. Court of Appeals  
District of Columbia Circuit

BY FRED W. FRIENDLY

PREPARED FOR DELIVERY AT  
THE FEDERAL COMMUNICATIONS BAR ASSOCIATION  
WASHINGTON, D.C.  
JANUARY 10, 1974

NOTE

3/18/74

Prof. Traynor read this speech today and suggests we publish it as is without bothering the author for footnotes.

Bob Bergin

(We should indicate the date of delivery if it is not needed)

## THE NERVOUS BREAKDOWN OF THE FIRST AMENDMENT

ONE OF AMERICA'S DISTINGUISHED EDITORS RECENTLY SENT ME A MESSAGE THROUGH A COLLEAGUE HE HAD MET AT A CONVENTION--"TELL FRIENDLY THE FIRST AMENDMENT ALSO INCLUDES THE RIGHT TO BE LOUSY."

WHEN THAT "RIGHT" IS PROJECTED TO THE ONLY NEWSPAPER IN TOWN OR ONE OF THE FEW TELEVISION STATIONS IN AN ENTIRE STATE, IT SEEMS TO JUSTIFY THE MOST CYNICAL OF ALL DEADLY SINS, THE RIGHT TO BE IRRESPONSIBLE:

...WHEN THE SURGEON GENERAL'S REPORT DOCUMENTS A RELATIONSHIP BETWEEN VIOLENCE ON TELEVISION AND SUBSEQUENT AGGRESSION IN CHILDREN, AND THE WORLD'S MOST RESPECTED NEWSPAPER PRINTS AN EXCLUSIVE NEWS STORY ON THE FINDINGS STATING THE EXACT OPPOSITE TO BE TRUE...

...WHEN RADIO LISTENERS FIND IT IMPOSSIBLE TO DETECT WHEN AN ANCHORMAN ENDS A NEWS ITEM ON THE ENERGY CRISIS AND BEGINS A COMMERCIAL MESSAGE BY A GASOLINE SPONSOR...

...WHEN VANDERBILT UNIVERSITY ESTABLISHES A VIDEO-TAPE LIBRARY AS SCHOLARS' ONLY DEPOSITORY OF THE NETWORK NIGHTLY NEWS PROGRAMS BECAUSE THE NETWORKS ERASE THIS VISUAL HISTORY, AND A NETWORK THEN SUES THEM FOR COPYRIGHT VIOLATION...

...WHEN, IN A BITTER STRUGGLE FOR A CABLE FRANCHISE, A TELEVISION STATION OWNER IN THE MIDWEST ORDERS A BLACKOUT AGAINST PEOPLE ASSOCIATED WITH THE OPPOSITION.

...WHEN THE MOST ENTERPRISING NEWS MAGAZINE IN TELEVISION, "60 MINUTES," IS DENIED TO ITS FAITHFUL AUDIENCE ALMOST 40% OF THE YEAR BECAUSE ITS SUNDAY EVENING TIME IS PRE-EMPTED BY KING FOOTBALL, AND PRIME TIME IS SIMPLY NOT AVAILABLE...

...WHEN PROSECUTORS, DEFENSE ATTORNEYS, AND REPORTERS CONSPIRE TO VIOLATE GRAND JURY SECRECY, AND THEN GO INTO A KIND OF RITUALISTIC WAR DANCE OF CHARGE AND COUNTER-CHARGE IN THE NAME OF FAIR-TRIAL, FREE PRESS... WHEN THE PROMINENT CIVIL RIGHTS LAWYER WHO DEFENDED BRILLIANTLY MIKE WALLACE'S RIGHT NOT TO HAND OVER THE OUT-TAKES AND NOTES OF HIS ALGIERS INTERVIEW WITH ELDRIDGE CLEAVER AND THEN BECAME VICE PRESIDENT AGNEW'S LAWYER DEMANDING FRED GRAHAM AND NINE OTHER REPORTERS HAND OVER ALL NOTES AND OUT-TAKES ON ALLEGED LEAKS IN THE AGNEW INVESTIGATION...

...WHEN ONE OF THE MOST RESPECTED NEWSPAPERS IN NEW ENGLAND RUNS A LEAD EDITORIAL AGAINST SNOWMOBILES DURING THE ENERGY CRISIS AND THEN IN THE SAME ISSUE DEVOTES ALMOST A FULL PAGE TO A REVENUE PRODUCING "NEWS STORY" ON THE JOYS OF SNOWMOBILES...

...WHEN COMMERCIAL STATION OWNERS AGREE TO TRY TO GET THE NETWORKS TO GO EASY ON THE NIXON ADMINISTRATION IN RETURN FOR PROTECTION AGAINST LICENSE CHALLENGES, A SLOW-DOWN ON CABLE AND A VETO ON THE PUBLIC BROADCASTING BILL...

THE PUBLIC DESPAIRS OF FINDING WHERE RIGHTS, PRIVILEGES, SPECIAL INTERESTS, BEGIN AND END WHEN THE RIGHT TO FAIL SERVES AS DEFENSE FOR THE SELF-GIVEN PRIVILEGE TO BE CARELESS WITH A PUBLIC TRUST, WHEN THE RIGHT OF FREE SPEECH AND THE RIGHTS OF THE

PRESS ARE BLURRED BY THE POLEMICS OF THE COURTROOM, THE NEWSROOM, AND THE OVAL ROOM.

IT IS TRUE THAT SPIRO, THE "WHITE KNIGHT" PRESIDENT NIXON DISPATCHED "TO KILL THE MESSENGER" IS NOW VANQUISHED, AND THE HIGH PRIESTS OF THE ANTI-MEDIA ASSAULT HAVE BEEN RENDERED INOPERATIVE BY A MINOR EVENT CALLED WATERGATE. BUT IT WOULD BE A WASTEFUL LEGACY OF THE ENCOUNTER, IF ALL THAT SURVIVED WAS A DOCTRINE PERMITTING RECKLESS JOURNALISM AND IRRESPONSIBLE OWNERSHIP TO BE PROTECTED BY A MISREADING OF THE BILL OF RIGHTS AND OF THE HISTORY OF 1973.

"...FALSELY SHOUTING FIRE IN A THEATRE AND CAUSING A PANIC..."

WITH THAT PHRASE, NOW AMERICAN SCRIPTURE, MR. JUSTICE HOLMES DREW THE OUTER LIMITS OF THE FIRST AMENDMENT PROTECTION. THE BILL OF RIGHTS WAS HIS TORAH, BUT HE UNDERSTOOD THAT ABSOLUTISM AND CONSTITUTIONALISM ARE ANTITHETICAL. FIFTY-FOUR YEARS LATER HOLMES' HISTORIC CAUTION MIGHT BE PARAPHRASED FOR "THOSE FALSELY SHOUTING FIRST AMENDMENT IN A CROWDED COURTROOM."

I DON'T KNOW WHICH ALARMS ME MORE -- PROSECUTORS AND JURISTS FLOODING THE COURTS WITH SUBPOENAED REPORTERS AND CONTEMPT CITATIONS OR NEWSMEN AND PUBLISHERS CRYING "FIRST AMENDMENT" EVERY TIME THEY ARE CHALLENGED. I DO KNOW THAT WHEN THESE EXCESSES ARE COMBINED WITH THOSE OF AN ADMINISTRATION WHICH TAMPERS WITH THE INTEGRITY OF BOTH COURTROOM AND NEWSROOM, WE HAVE ENOUGH TO CAUSE THE NERVOUS BREAKDOWN OF THE FIRST AMENDMENT.

I BELIEVE THAT THE FIRST AMENDMENT IS IN TROUBLE NOT ONLY BECAUSE OF ALL THOSE DIRTY TRICKS IN THE NAME OF LAW, ORDER, AND THE COMMITTEE TO RE-ELECT THE PRESIDENT, BUT ALSO BECAUSE OF A SERIES OF SELF-INFLICTED WOUNDS FROM THOSE JOURNALISTS, PUBLISHERS, AND BROADCASTERS WHO NEED IT MOST. THE FIRST AMENDMENT IS A DOCTRINE WHOSE SPIRIT HAS BEEN THE IMMOVABLE BASE FOR FREE SPEECH. THOSE WHO WOULD HIDE BEHIND SOME SELF-SERVING ABSOLUTISM IN ITS LAW DISTORT THE AMENDMENT'S HISTORY AND CLOUD ITS FUTURE. THE PUBLIC MIGHT BETTER UNDERSTAND THE NEWSMEN'S SUBPOENA ISSUE IF THE PRESS HAD BEEN AS DILIGENT IN ITS DEFENSE OF THE THOUSANDS OF VOICELESS CITIZENS FROM LESLIE BACON TO THE FORT WORTH 5 WHO HAVE BEEN VICTIMS OF OPEN-ENDED SUBPOENAS WITH NO KNOWLEDGE OF THE CRIME BEING INVESTIGATED OR WHAT THEIR RIGHTS WERE. SIMILARLY WITH THE RECENT NEWSMEN'S PROTEST AGAINST THE TELEPHONE COMPANY'S SWIFT COMPLIANCE WITH PROSECUTORS' REQUESTS FOR RECORDS OF REPORTERS' LONG DISTANCE PHONE CALLS WITHOUT COURT ORDER: THE REPORTERS' PROTEST MIGHT HAVE MORE CITIZEN IDENTIFICATION HAD THEY EVER BOTHERED TO REPORT THAT HUNDREDS OF THOUSANDS, PERHAPS MILLIONS, OF UNKNOWN INDIVIDUALS HAVE HAD THEIR TELEPHONE BILLS AND RECORDS SCRUTINIZED BY FEDERAL AND STATE INVESTIGATORS WHOSE NEED TO KNOW HAD NEVER BEEN QUESTIONED. AS ONE ILLUSTRIOUS TEACHER OF THE LAW RECENTLY PUT IT TO ME -- "THE ETERNAL VIGILANCE OF THE PRESS MIGHT APPEAR BRIGHTER IF ITS FLAME DIDN'T ALWAYS SEEM TO CAST ITS GLOW OVER ITS OWN HIGHLY VISIBLE PROFILE."

JAMES MADISON AND PATRICK HENRY DID NOT DRAFT THE FIRST AMENDMENT AS A PROTECTIVE CODE OR SLOGAN FOR THE PRIVILEGE OF ANY

SPECIAL TRADE LOBBY NO MATTER HOW NOBLE THAT CALLING MIGHT BE, THOSE WHO WOULD DO SO OBFUSCATE ITS TRUE MEANING: IDENTIFYING PROPERTY RIGHTS GRANTED BY GOVERNMENT FRANCHISES WITH INHERENT PERSONAL RIGHTS OF FREE SPEECH INTENDED TO MAINTAIN THE CITIZEN'S CONTROL OVER POSSIBLE TYRANNY.

JAMES MADISON'S THEORY THAT FREE GOVERNMENT WITHOUT FREE PRESS IS A SHAM HAD ITS MOMENT OF TRUTH IN THE CRUCIBLE HISTORY WILL CALL WATERGATE. THE EVIDENCE ONCE LEAKING, NOW GUSHING OUT OF WASHINGTON IN A TORRENT OF SHAME, REVEALS MEN AROUND RICHARD NIXON, AND PERHAPS THE PRESIDENT HIMSELF, WHO OBSTRUCTED JUSTICE, LAID SIEGE TO THE CONSTITUTION, AND CAME CLOSE TO SUCCEEDING. WHAT WAS IT THE PRESIDENT WAS QUOTED AS SAYING? "I DON'T GIVE A GOOD GOD-DAMN ABOUT THAT; IT'S MORE IMPORTANT TO FIND THE SOURCE OF THESE LEAKS RATHER THAN WORRY ABOUT THE CIVIL RIGHTS OF SOME BUREAUCRAT."

SOME OF YOU MAY WINCE AT MY CHOICE OF TERMS AND FIND THEM EXTREME, BUT THE RECORD, EVEN IN THE PRESIDENT'S OWN WORDS AND CONTRADICTIONS, DOCUMENTS THE ADMINISTRATION'S DETERMINATION "TO GET THE INSTITUTION" OF JOURNALISM, AS ONE WHITE HOUSE OFFICIAL PUT IT. MR. NIXON'S NEWSWORTHINESS AND HIS TRUSTWORTHINESS ARE IN CONSTANT CONFLICT. LET'S EXAMINE NIXON VS. NIXON. ALMOST A YEAR AGO, ON THE EVE OF HIS SECOND INAUGURAL, MR. NIXON, IN AN EXTRAORDINARY INTERVIEW WITH SAUL PETT OF THE ASSOCIATED PRESS, MADE IT "PERFECTLY CLEAR" THAT, UNLIKE HIS PREDECESSORS,

HE INSULATES HIMSELF FROM TELEVISION NEWS AND NEWSPAPERS, LEST HE, TO QUOTE THE PRESIDENT'S OWN WORDS, "...GO UP THE WALL." TIME AND TIME AGAIN IN THE INTERVIEW HE PROCLAIMS HIS LACK OF EMOTION. IN HIS WORDS, "I HAVE A REPUTATION FOR BEING THE COOLEST PERSON IN THE ROOM..." FOUR TIMES HE INSISTED THAT HE NEVER READS COLUMNISTS OR WATCHES COMMENTATORS, "ALL THAT MATTERS IS THAT IT COMES OUT ALL RIGHT. "SIX MONTHS FROM NOW NOBODY WILL REMEMBER WHAT THE COLUMNISTS WROTE."

IT'S NOT JUST THAT PRESIDENT NIXON PROPHESED WRONGLY, BUT THAT HE TRIED TO DECEIVE US ALL, AND MAYBE HIMSELF, IN SPINNING THAT YARN ABOUT THE COOL HAND AT THE TILLER IMPERVIOUS TO THE STORM OF PRESS CRITICISM. THE WHITE HOUSE PAPERS OF 1969 THROUGH 1971 RECENTLY RELEASED BY THE SENATE WATERGATE COMMITTEE, SHOW THE CHIEF EXECUTIVE AS A CONSTANT MONITOR OF WHAT HE CLAIMED TO IGNORE.

AN OCTOBER 17, 1969 MEMORANDUM FROM J. S. MAGRUDER TO H. R. HALDEMAN, LOGS "21 REQUESTS FROM THE PRESIDENT IN THE LAST 30 DAYS REQUESTING SPECIFIC ACTION "...RELATING TO ...NEWS COVERAGE,"

SOME EXAMPLES:

TO: P. FLANIGAN

PRESIDENT'S REQUEST THAT YOU TAKE ACTION TO COUNTER DAN RATHER'S ALLEGATION THAT THE HERSHEY MOVE WAS DECIDED UPON BECAUSE OF THE MORATORIUM. (LOG 1733)



P. BUCHANAN

PRESIDENT'S REQUEST FOR A REPORT ON WHAT ACTIONS WERE TAKEN TO COMPLAIN TO NBC, TIME AND NEWSWEEK CONCERNING A RECENT ARTICLE COVERAGE ON THE ADMINISTRATION. (Log 1688)

H. KLEIN

PRESIDENT'S REQUEST FOR LETTERS TO THE EDITOR OF NEWSWEEK MENTIONING THE PRESIDENT'S TREMENDOUS RECEPTION IN MISS. AND LAST SAT. MIAMI DOLPHINS FOOTBALL GAME. (Log 1627)

H. KLEIN

PRESIDENT'S REQUEST THAT YOU DEMAND EQUAL TIME TO COUNTER JOHN CHANCELLOR'S COMMENTARY REGARDING THE HAYNSWORTH NOMINATION. (Log 1559)

H. KLEIN

PRESIDENT'S REQUEST THAT WE HAVE THE CHICAGO TRIBUNE HIT SENATOR PERCY HARD ON HIS TIES WITH THE PEACE GROUP. (Log 1495) CONFIDENTIAL

H. KLEIN &  
RON ZIEGLER

PRESIDENT'S REQUEST THAT YOU ATTACK LIFE MAGAZINE'S EDITORIAL ACCUSING THE ADMINISTRATION OF CREATING A COHERENCE GAP. (Log 1366)

TWENTY-ONE DIRECTIVES IN 30 DAYS FROM A PRESIDENT WHO PROCLAIMS THAT HE PAYS NO ATTENTION TO WHAT IS SAID ABOUT HIM

LEST HE "GO UP THE WALL." THE SAME MEMOS ON WHITE HOUSE STATIONERY RECOMMEND USING THE FCC, THE INTERNAL REVENUE SERVICE AND THE JUSTICE DEPARTMENT'S ANTI-TRUST DIVISION, AS WEAPONS "SHOT-GUNNING THE MEDIA," AS THEY PUT IT, "ON UNFAIR COVERAGE." THE PRESIDENT CAN DENY SUCH POLICIES. BUT CONTRASTING WHAT MR. NIXON SAYS HE WATCHES AND READS, AND WHAT MR. NIXON, IN FACT, DOES WATCH AND READ, WE MAY RIGHTLY QUESTION WHETHER ALL THE FORAYS BY AGNEW, MITCHELL, COLSON, BUCHANAN, HALDEMAN, EHRLICHMAN, KLEIN, AGAINST DAN SCHORR, DAN RATHER, DAVID BRINKLEY, MIKE WALLACE, WALTER CRONKITE, SANDER VANOCUR, ANTHONY LEWIS, KATHERINE GRAHAM, JACK ANDERSON, TOM WICKER, BILL MOYERS, AND A SEEMINGLY ENDLESS LIST OF OTHER NEWSMEN, WERE JUST THE ABERRATIONS OF BLIND ZEALOTS. OR WERE THOSE ATTACKS NOT PART OF THE CAREFULLY ORCHESTRATED GRAND DESIGN OF AN ADMINISTRATION THAT SIMPLY DID NOT BELIEVE IN AN OPEN SOCIETY? WALTER CRONKITE (AND OTHERS) ONCE CALLED IT A CONSPIRACY AGAINST A FREE PRESS. SOME REASONABLE MEN LAUGHED AT US THEN AS PARANOID, BUT NOBODY'S LAUGHING NOW.

THE NIXON ADMINISTRATION'S OBSESSION WITH ITS POLITICAL ENEMIES, REAL AND IMAGINED, IS DOCUMENTED BY ITS CLUMSY FLEXING OF GOVERNMENT REGULATORY MUSCLE AGAINST THOSE NEWS ORGANIZATIONS WHOSE INVESTIGATIVE REPORTING AND NEWS ANALYSIS IRKED THE WHITE HOUSE.

SOME EXAMPLES:

WHEN THE WASHINGTON POST VIRTUALLY ALONE WAS PURSUING THE WATERGATE INVESTIGATION, CLOSE NIXON ALLIES IN FLORIDA BROUGHT

ACTION TO CHALLENGE THE Post'S TELEVISION LICENSES IN JACKSONVILLE AND MIAMI. SIMULTANEOUSLY, THE DIRECTOR OF PRESIDENT NIXON'S OFFICE OF TELECOMMUNICATIONS POLICY DANGLED A CARROT-AND-STICK PROPOSITION BEFORE BROADCAST STATIONS, OFFERING FIVE INSTEAD OF THREE YEAR LICENSES, IF THEY WOULD JUST CONTROL THE FLOW OF ALL THAT "ELITIST GOSSIP" AND "IDEOLOGICAL PLUGOLA" FROM THE NETWORK NEWS ORGANIZATIONS.

ON THE MATTER OF PUBLIC BROADCASTING PRESIDENT NIXON'S DISTASTE WAS NEVER MASKED. HIS STAFF SPREAD THE WORD THAT LONG-RANGE FUNDING MIGHT BE FORTHCOMING IF VANOCUR, MOYERS, BUCKLEY AND ALL PUBLIC TELEVISION'S NATIONAL NEWS PROGRAMS WERE ABANDONED. ONE OF THOSE WHITE HOUSE MEMOS SAYS, "WE MAY HAVE TO FIRE OR DISCREDIT VANOCUR IF WE ARE TO GET ANYTHING APPROACHING AN EVEN SHAKE OUT OF THAT LEFT-WING TAX PAYERS' SUBSIDIZED NETWORK," A STATEMENT IN DIRECT VIOLATION OF THE PUBLIC BROADCAST LAW WHICH PROHIBITS PRESIDENTIAL OR CONGRESSIONAL INTERFERENCE WITH PROGRAMS.

IN JUNE OF 1972, PRESIDENT NIXON VETOED THE PUBLIC BROADCAST FUNDING BILL THE CONGRESS HAD PASSED BY OVERWHELMING MAJORITIES AND HIS ADVISORS HAD ASSURED ALL HE WOULD APPROVE. BECAUSE OF THE DETERMINATION OF NPACT (NATIONAL PUBLIC AFFAIRS CENTER FOR TELEVISION) AND VARIOUS STATIONS, PUBLIC BROADCASTING STAYED IN THE NEWS BUSINESS. WITH A KIND OF POETIC JUSTICE, ITS UNABRIDGED BROADCASTING OF THE WATERGATE HEARINGS NOT ONLY

PROVIDED THE AMERICAN PUBLIC WITH ITS MOST COMPREHENSIVE COVERAGE, BUT WATERGATE IN TURN PROVIDED PUBLIC TELEVISION WITH ITS ALL-TIME FUND RAISING BONANZA. THE IRONY PROMPTED ONE WAG TO REMARK THAT PERHAPS WATERGATE WAS THAT LONG-RANGE FUNDING PLAN THE WHITE HOUSE HAD PROMISED.

THE ADMINISTRATION'S SUBVERSIVE AND IF I MAY SAY SO -- UN-AMERICAN -- POLICIES AGAINST THE FIRST AMENDMENT HAVE SPREAD THEIR CONTAGION TO OTHER ELEMENTS OF GOVERNMENT, SPECIFICALLY TO THE COURTS, OUR ULTIMATE GUARDIAN OF THE BILL OF RIGHTS. THE 1972 SUPREME COURT DECISION IN CALDWELL, BRANZBURG AND PAPPAS WAS NARROWLY SPLIT. IF JUSTICE POWELL'S VOTE HAD ONLY MATCHED THE SPLENDID RHETORIC OF HIS OPINION, WE MIGHT HAVE AVOIDED THE RASH OF SUBPOENAS LAZY PROSECUTORS HAVE SERVED ON REPORTERS IN WHAT GENERALLY PROVE TO BE MERE FISHING EXPEDITIONS. CALDWELL HAS MERELY SWELLED THE TIDE OF SUBPOENAS AGAINST REPORTERS. THE CHICAGO TRIBUNE HAS RECEIVED 350 SUBPOENAS SINCE THE 1968 DEMOCRATIC CONVENTION. CBS AND NBC RECEIVED 121 IN THE FIRST TWO AND A HALF YEARS OF THE NIXON ADMINISTRATION, WHILE THE LOS ANGELES TIMES HAS 80 SUBPOENAS TO FIGHT.

BEYOND THESE SUBPOENAS, COURTS AT EVERY LEVEL HAVE RULED AGAINST THE PRESS, ADVISING ALL THAT THE PRIOR RESTRAINT EFFORTS, AS WE LEARNED IN THE PENTAGON PAPERS CASE, ARE UNCONSTITUTIONAL EXCEPT WHEN THEY APPLY TO THE COURTS.

-- FOR THE FIRST TIME, IN LOUISIANA, A FEDERAL CONTEMPT CITATION HAS BEEN HANDED DOWN TO REPORTERS BREAKING A GAG ORDER ON A PUBLIC PROCEEDING IN U.S. DISTRICT COURT. AND THE SUPREME COURT

HAS REFUSED TO REVIEW THE DECISION, THUS SANCTIONING A FORM OF PRIOR RESTRAINT SINCE REPORTERS MUST NOW OBEY A GAG ORDER FOR THE ENTIRE TIME IT TAKES TO APPEAL THE GAG.

-- IN FLORIDA, A FEDERAL JUDGE HAS CITED CBS IN CONTEMPT OF COURT FOR BROADCASTING SKETCHES OF A PUBLIC PRE-TRIAL HEARING ON WHICH THE PRESIDING JUDGE HAD PROHIBITED ALL DRAWING OR PHOTOGRAPHING. CBS RECEIVED THE CITATION EVEN THOUGH ITS ARTIST HAD ATTENDED THE HEARING AND, ONLY AFTER IT WAS OVER, SKETCHED THE DRAWINGS FROM MEMORY. IN NEW JERSEY AN ARTIST WAS "GAGGED" SO TO SPEAK FROM SKETCHING IN A COURTROOM.

AT OTHER LEVELS OF JUSTICE THERE HAVE BEEN SEVERAL DECISIONS AGAINST A REPORTER'S RIGHT NOT TO DISCLOSE CONFIDENTIAL SOURCES:

-- A VERMONT STATE COURT HAS FOUND A TELEVISION REPORTER IN CONTEMPT FOR REFUSING TO DIVULGE A SOURCE TO THE DEFENSE IN A CRIMINAL TRIAL.

-- IN MASSACHUSETTS, A TRIAL JUDGE HAS ORDERED A REPORTER TO NAME A CONFIDENTIAL SOURCE IN A LIBEL SUIT IN WHICH SHE AND HER PAPER, THE WALL STREET JOURNAL, ARE DEFENDANTS.

-- AND, IN ONE FINAL EXAMPLE, A FLORIDA COUNTY GRAND JURY SENTENCED A REPORTER TO FIVE MONTHS IN JAIL FOR REFUSING TO ANSWER QUESTIONS ON HER SOURCES.

ALL OF THESE CASES ARE NOW ON APPEAL AND IN MOST OF THEM NEITHER THE JUDGE NOR THE PROSECUTORS HAVE MET THE BURDEN OF PROOF THAT THE INFORMATION SOUGHT IS NOT AVAILABLE FROM ANY OTHER SOURCE AND THAT THE EVIDENCE IS VITAL TO PROVE A CLEAR VIOLATION OF CRIMINAL LAW.

ON ANOTHER DISTURBING FRONT, THE FLORIDA SUPREME COURT RULED THIS SUMMER THAT A NEWSPAPER MUST PUBLISH "ANY REPLY" A CANDIDATE FOR OFFICE MIGHT MAKE IF THE NEWSPAPER HAS ATTACKED, OR PRINTED STATEMENTS OF OTHERS WHO HAVE ATTACKED, A CANDIDATE'S PERSONAL CHARACTER. THE FLORIDA HIGH COURT USED THE STATE'S OLD AND RARELY EXERCISED "RIGHT OF REPLY" STATUTE IN ITS RULING.

THE RULING, LIKE THE LAW, IS PROBABLY UNCONSTITUTIONAL, AND, HOPEFULLY THE UNITED STATES SUPREME COURT WILL SO RULE. BUT DON'T BET ON IT. WHILE THE AMERICAN CIVIL LIBERTIES UNION AND MANY NEWS ORGANIZATIONS HAVE FILED AMICUS BRIEFS ON BEHALF OF THE PRESS, THERE ARE SOME RESPECTED CIVIL LIBERTARIANS WHO CLAIM THE CANDIDATE IN QUESTION, PAT TORNILLO, HAS A STRONG CASE AGAINST THE MIAMI HERALD. ONE OF THEM IS JEROME BARRON, LAW PROFESSOR, AND MR. TORNILLO'S CHIEF COUNSEL. IN HIS BRIEFS AND IN HIS WORRISOME BOOK, FREEDOM OF THE PRESS FOR WHOM?, PROFESSOR BARRON ARGUES THAT FIRST AMENDMENT PROTECTIONS EXIST FOR THE CITIZENS' RIGHT TO BE HEARD, NOT FOR THE PROTECTION OF A CHAIN OWNING, IN ADDITION TO THE HERALD, 15 DAILY AND 7 WEEKLY NEWSPAPERS DELIVERING 18 MILLION NEWSPAPERS EACH WEEK. BARRON BELIEVES THAT THE THREAT OF GOVERNMENT CENSORSHIP SO FEARED BY THE FOUNDING FATHERS, HAS BEEN SUPPLANTED BY THE PRESENCE OF CENSORSHIP FROM HUGE MONOPOLIES, BORN OF THE TREMENDOUS ECONOMIC PRESSURES INHERENT IN F.C.C. FRANCHISES OR THE HIGH COSTS OF STARTING A NEWSPAPER.

HIS ARGUMENTS MAKE ME UNCOMFORTABLE. BUT I, FOR ONE, WOULD

FEEL LESS NERVOUS HAD THE MIAMI HERALD'S EDITORIAL JUDGMENT NOT EXPOSED THE FIRST AMENDMENT TO SUCH A SERIOUS ATTACK. ITS EDITORIAL HAD CHARGED TORNILLO, THEN CAMPAIGNING FOR THE STATE LEGISLATURE, OF BREAKING STATE LAWS DURING A TEACHERS' STRIKE. THEIR REFUSAL TO PRINT HIS REPLY, ASSUMING IT WAS NOT LIBELOUS, HAS SUBJECTED THE NEWSPAPER TO LITIGATION WHICH NEEDLESSLY EXPOSES A RAW NERVE. IT MAY BE THE HERALD'S EDITORIAL PAGE, BUT IT IS EVERYBODY'S FIRST AMENDMENT. THE HERALD'S ALMOST KNEE-JERK INTRANSIGENCE IN THE FIRST INSTANCE BURDENS THE FIRST AMENDMENT WITH ANOTHER COURTROOM CONFRONTATION.

NEWSPAPERS WOULD BE IN A BETTER POSITION TO ARGUE THEIR FIRST AMENDMENT RIGHTS HAD THEIR LOBBYISTS NOT URGED PASSAGE OF THE 1970 NEWSPAPER PRESERVATION ACT. THEY GLIBLY REASONED THAT THE FIRST AMENDMENT DOES NOT PREVENT CONGRESS FROM EXPANDING THE FREEDOM OF THE PRESS, AND NEWSPAPERS NOW ENJOY RELIEF FROM CERTAIN ANTI-TRUST REGULATIONS. THEY CANNOT HAVE IT BOTH WAYS. MY COLLEAGUE NORMAN ISAACS, FORMER PRESIDENT OF THE AMERICAN SOCIETY OF NEWSPAPER EDITORS, PUTS IT BLUNTLY, "SOME OF THE ENLIGHTENED NEWSPAPERS IN THIS COUNTRY OPPOSED THE NEWSPAPER PRESERVATION ACT, AND THEIR WARNINGS ABOUT THIS BRINGING SELF-INFLICTED HARM TO THE FIRST AMENDMENT MAY COME TO HAUNT NEWSPAPER JOURNALISM IN YEARS TO COME. ALREADY WE SEE THE LIMITING OF FREE EXPRESSION AS MORE AND MORE INDEPENDENT NEWSPAPERS FALL VICTIM TO THE SWEEP OF GIANT CHAINS. IT IS PRESERVATION, ALL RIGHT, BUT FRIGHTENINGLY LIKE THE PRESERVATION AS PRACTICED BY MORTUARIES."

BROADCASTERS TOO, ARE GUILTY OF FIRST AMENDMENT ABUSES. IN THEIR CAMPAIGN TO REPEAL THE FAIRNESS DOCTRINE, THEY ARE SEEKING NEWSPAPERS' SUPPORT, CALLING THE TORNILLO CASE THE APPLICATION OF THE FAIRNESS DOCTRINE TO THE PRINT PRESS. THE COMPARISON IS SPURIOUS BECAUSE NEWSPAPERS, UNLIKE BROADCAST STATIONS, ARE NOT LICENSED BY FEDERAL AUTHORITY, AND WHEN NEWSPAPER MONOPOLIES EXIST THEY ARE NOT THE RESULT OF GOVERNMENT FRANCHISES. BROADCASTERS WOULD HAVE US BELIEVE THAT A BROADCAST STATION IS NO DIFFERENT FROM A SOAPBOX, A PAMPHLET OR A NEWSPAPER, AND REMINDING US THAT, "CONGRESS SHALL MAKE NO LAW ABRIDGING (THEIR) FREEDOM OF SPEECH . . ." THE TROUBLE WITH THAT OVERSIMPLIFIED POLEMIC IS THAT IT ASSUMES THAT ALL CITIZENS SPEAK WITH EQUAL TONGUES. THAT IS NOT SO IN TELEVISION AND RADIO, WORKING WITHIN THE LIMITS OF THE ELECTROMAGNETIC SPECTRUM. THE COMMUNICATIONS ACT GAVE A VERY FEW CITIZENS AND CORPORATIONS THE RIGHT TO USE CERTAIN EXTREMELY LIMITED CHANNELS AND PRECLUDED ALL OTHERS FROM THE USE OF THOSE CHANNELS. BECAUSE IN THE EARLY DAYS SOME BUCCANEER BROADCASTERS ABUSED THAT PRIVILEGE, THE FAIRNESS DOCTRINE WAS CREATED TO MAKE CERTAIN THAT PREJUDICED OWNERS, NO MORE THAN A ZEALOUS GOVERNMENT, COULD NOT CONTROL THIS UNIQUELY LIMITED AND CRUCIAL APPARATUS BY WHICH THE NATION SO LARGELY INFORMS ITSELF. THE FAIRNESS DOCTRINE WHICH MANY BROADCASTERS CLAIM DILUTES ITS BROADCAST PROGRAMMING SIMPLY STATES THAT A LICENSEE MUST WORK:

1. TO DEVOTE A REASONABLE AMOUNT OF BROADCAST TIME TO THE DISCUSSION OF CONTROVERSIAL ISSUES; AND



2. TO DO SO FAIRLY IN ORDER TO AFFORD REASONABLE OPPORTUNITY FOR OPPOSING VIEWPOINTS,

COMPLIANCE WITH SUCH A DOCTRINE MERELY MAKES THE BROADCASTER THE PUBLIC TRUSTEE HE IS OBLIGATED TO BE. EVERY JOURNALIST WORTHY OF THE NAME SUBSCRIBES TO SUCH PRINCIPLES. CALLING THE FAIRNESS DOCTRINE PER SE A PROHIBITION TO BOLD JOURNALISM CHALLENGES CREDIBILITY. THIS IS NOT TO SAY THAT THE DOCTRINE IS PERFECT OR THAT THE APPLICATION OF IT HAS NOT BEEN WITHOUT FAULT. IT IS TRUE THAT INCREASINGLY IN THE LAST DECADE THERE HAS BEEN AN ATTEMPT TO MAKE THE F.C.C. THE REFEREE OF FAIR JOURNALISM -- TO SECURE PERFECT FAIRNESS ON A CASE BY CASE BASIS. BUT WHAT WE SHOULD LOOK TO ARE WAYS OF IMPROVING THE FAIRNESS DOCTRINE, MAKING IT MORE MANAGEABLE AND SEEKING WAYS TO CHANGE IT WITH NEW TECHNOLOGICAL INNOVATION, RATHER THAN MAKING HOLLOW CLAIMS THAT THE FIRST AMENDMENT PROSCRIBES THE DOCTRINE. WHETHER THE COMMISSION, THE COURTS, OR THE CONGRESS UNDERSTAND THE SENSITIVE RESTRAINTS UNDER WHICH THE FAIRNESS DOCTRINE SHOULD BE CONDUCTED IS ANOTHER MATTER, BUT REPEALING IT IS NO SOLUTION.

THE ACCURACY IN MEDIA vs. N.B.C. IS A MONSTROUS CASE OF TWO WRONGS NOT MAKING A RIGHT BUT DENYING EVERYONE'S RIGHTS. IT IS A CAPITAL LETTER VIOLATION BY THE F.C.C. OF THE ESSENTIAL SPIRIT OF THE FAIRNESS DOCTRINE TO CORRECT A CONCEIVABLE BUT CERTAINLY LOWER CASE VIOLATION BY N.B.C. NEWS. THE ORIGINAL BROADCAST, "PENSIONS: THE BROKEN PROMISE" WAS A BOLD DEMONSTRATION OF INVESTIGATIVE REPORTING LARGELY CONCERNED WITH DEFECTS IN THE

PRIVATE PENSION SYSTEM NECESSITATING REMEDIAL ACTION -- NOT WITH COUNTERING CONSIDERATIONS OR EXAMPLES OF PENSION PLANS WHICH WORK. THAT'S PERFECTLY NATURAL: EVERY NEWS ORGANIZATION IS SOMETIMES GUILTY OF NOT BALANCING MUCKRAKERS' ZEAL WITH THE PLODDING DULLNESS OF FULSOME FAIRNESS. GOOD NEWSPAPERS COUNTER IMBALANCED COVERAGE WITH LETTERS TO THE EDITOR. C.B.S. NEWS NEVER SATISFIED THE CRITICS OF "THE SELLING OF THE PENTAGON," BUT MADE A REASONABLE ATTEMPT BY OPENING UP AN HOUR OF PRIME TIME TO THOSE WHO FOUND FAULT WITH IT. IN THE MURROW-McCARTHY BROADCAST TWO DECADES AGO, THE WISCONSIN SENATOR ACCEPTED A 30-MINUTE REBUTTAL OFFER IN WHICH, INCIDENTALLY, HE PRODUCED AN INDICTMENT OF HIMSELF FAR MORE INCRIMINATING THAN THE ORIGINAL.

THE N.B.C. DOCUMENTARY WAS AN EYE-OPENING STUDY OF A CONSUMER FRAUD THAT INVOLVES MOST AMERICANS AND IS SELDOM TOUCHED BY PRINT OR BROADCAST JOURNALISM. CORRESPONDENT ED NEWMAN AND PRODUCER DAVID SCHMERLER FOCUSED THEIR SEARCHLIGHT ON THE DARK SIDE OF AN OTHERWISE HEALTHY INSTITUTION. THEY NEVER CONTENDED THAT ALL PENSION PLANS WERE SICKLY; IN FACT THE PROGRAM'S CLOSING INCLUDED THE STATEMENT "THAT THE RECORD OF THE PRIVATE PENSION SYSTEM IS EXCELLENT (BUT) SOME LOOPHOLES NEED TO BE CLOSED." MY PROFESSIONAL CRITICISM IS THAT N.B.C. NEWS SHOULD HAVE BEEN MORE AGGRESSIVE IN SEEKING OUT A&P EXECUTIVES AND THE CUSTODIANS OF THE OTHER PENSION PLANS UNDER ATTACK AND CONFRONTING THEM WITH THE ACCUSATION AGAINST THEM. IF THEY WERE UNAVAILABLE TO COMMENT, N.B.C. SHOULD HAVE SAID SO.

JUDGE J. SKELLY WRIGHT ONCE SAID "IN SOME AREAS OF THE LAW IT IS EASY TO TELL THE GOOD GUYS FROM THE BAD GUYS . . . IN THE CURRENT DEBATE IN THE BROADCAST MEDIA AND THE FIRST AMENDMENT . . . EACH DEBATER CLAIMS TO BE THE REAL PROTECTOR IN THE FIRST AMENDMENT . . . AND THE ANSWERS ARE NOT EASY." IN THE N.B.C. PENSION CASE THERE ARE NO BAD GUYS, ONLY DECENT MEN LOST IN THE THICKET. THE LAWYER FOR N.B.C. IS FLOYD ABRAMS WHOSE CAMPAIGN RIBBONS FOR MERITORIOUS SERVICE RANGE FROM THE PENTAGON PAPERS TO THE AGNEW SUBPOENA CASE, TO KNOPF VS. THE C.I.A. ON THE OTHER SIDE IS DEAN BURCH WHO CONTRARY TO MANY PREDICTIONS HAS BECOME AN OUTSTANDING F.C.C. CHAIRMAN OF THE TELEVISION AGE, STEADFASTLY REFUSING TO PERMIT THE COMMISSION TO BECOME A SUPER EDITOR, ESTABLISHING AN OFFICIAL GOVERNMENT STAND ON TRUTH, OR ORDERING "A PINCH HERE AND A PINCH THERE."

GRANTED THAT THE PLAINTIFF ACCURACY IN MEDIA HAD AS MUCH RIGHT AS NADER'S GROUP OR THE UNITED CHURCH OF CHRIST OR ANY OTHER PUBLIC INTEREST GROUP TO INTERVENE. YET, HOW COULD BURCH, HIS COMMISSIONERS AND ABRAMS AND HIS CLIENT OCCUPY SUCH OPPOSITE AND DANGEROUS GROUND? MY RELUCTANT GUESS -- TO TEACH EACH OTHER A LESSON: N.B.C. ONCE AND FOREVER TO BANISH THE FAIRNESS DOCTRINE BECAUSE, "THE FAIRNESS DOCTRINE MARKS INTRUSION INTO THE VERY PROCESS OF TELEVISION JOURNALISM AND VIOLATES THE FIRST AMENDMENT." THE F.C.C., FRUSTRATED BY N.B.C.'S INTRANSIGENCE, JUMPED FAR FROM BURCH'S ORIGINAL POSITION THAT FAIRNESS WILL NOT BE ADJUDICATED ON A PROGRAM-BY-PROGRAM BASIS, TO A POSITION OF TOTAL INTERVENTION. THE COMMISSION DECIDED:

. . . HAVING THUS PRESENTED VIEWPOINTS ON ONE SIDE OF THE ISSUE OF THE OVERALL PERFORMANCE AND NEED FOR REGULATION OF THE PRIVATE PENSION SYSTEMS, N.B.C. WAS OBLIGATED UNDER THE FAIRNESS DOCTRINE TO AFFORD REASONABLE OPPORTUNITY IN ITS OVERALL PROGRAMMING FOR THE PRESENTATION OF CONTRASTING VIEWS . . . IT IS ORDERED THAT N.B.C. SUBMIT A STATEMENT WITHIN 20 DAYS . . . INDICATING HOW IT INTENDS TO FULFILL ITS FAIRNESS DOCTRINE OBLIGATIONS IN ACCORDANCE WITH THIS OPINION . . . .

THE LESSON THESE "GOOD GUYS" ARE TRYING TO TEACH EACH OTHER AND WHICH HAS ENDED UP IN THE COURTS IS NOT LIKELY TO BE ONE WHICH WILL "ENCOURAGE FREE AND ROBUST DEBATE." I HAVE BELIEVED IN THE FAIRNESS DOCTRINE SINCE THE DAYS OF G. A. RICHARDS WHEN HE DECLARED, "THIS IS MY STATION AND I'LL DO WHAT I WANT WITH IT." BUT THIS RULING ON "PENSIONS" NO MATTER HOW FAR THE F.C.C. FEELS ITS PATIENCE WAS TESTED, PROVIDES AN INVITING WEAPON FOR THOSE WHO WOULD REPEAL THE FAIRNESS DOCTRINE.

THE A.I.M. PEOPLE FURTHER TORTURE THE PRINCIPLE BY WRITING ALL N.B.C. AFFILIATES, AFTER THE STAFF RULING AND WHILE THE CASE WAS STILL PENDING BEFORE THE COMMISSION, INTIMIDATING THEM WITH THE THREAT THAT FAIRNESS COMPLAINTS WOULD BE INSERTED IN THEIR RENEWAL FILES IF THEY DIDN'T REMEDY THE NETWORK'S "IMBALANCE ON PENSIONS."

STRICTLY ON PROFESSIONAL STANDARDS, ONE CAN REGRET THAT N.B.C. NEWS IN ITS FAIRMINDED TRADITION DID NOT CHOOSE TO USE ITS

OWN AIR TO VENTILATE THE ISSUE ONCE THE CONTROVERSY AROSE. THIS IS AN ISSUE OF CONTINUING IMPORTANCE, ESPECIALLY ON CAPITOL HILL. N.B.C. HAD EVERY JUSTIFICATION TO BE PROUD OF ITS INVESTIGATIVE JOURNALISM. MY CRITICISM IS THAT IT GOT ON ITS HIGH HORSE IN ITS UNWILLINGNESS, ON ITS OWN TERMS, TO DEVOTE ANY ADDITIONAL PRIME TIME EXPOSURE TO THIS CONTINUING CONTROVERSY. THE VENT OF MORE AIR-TIME IS THE ONLY ESCAPE VALVE FOR A PRESSURIZED SITUATION. N.B.C. NEWS "OWNED THE STORY" OF PENSIONS. PURSUING IT FURTHER INSTEAD OF SMOTHERING IT MIGHT HAVE KEPT THE F.C.C. OUT OF ITS NEWSROOM, AND N.B.C. NEWS OUT OF THE COURTROOM. EVEN NOW THEY COULD ADVANCE THE PUBLIC'S CONSCIOUSNESS ON THE ISSUE OF PENSIONS AND THE CONTROVERSY OVER THE FAIRNESS DOCTRINE BY SCHEDULING A COMPREHENSIVE DOCUMENTARY ON THE CHAIN OF EVENTS WHICH HAVE OCCURRED SINCE THE ORIGINAL BROADCAST EIGHTEEN MONTHS AGO. A PROVOCATIVE TITLE MIGHT BE "PENSIONS: THE BROKEN PROMISE AND THE FAIRNESS DOCTRINE, THE BROKEN RECORD." I EVEN KNOW WHERE THEY CAN GET AN "OVERAGE BATTLESHIP" WHO WOULD COME OUT OF RETIREMENT TO PRODUCE IT FOR A FEE OF ONE DOLLAR.

FAR MORE ABUSIVE OF THE FIRST AMENDMENT THAN THE CENSORING OF THE F.C.C., THAT TRADITIONAL LEANING TOWER OF JELLO, IS THE SOARING TIMIDITY OF SOME BROADCASTERS. THE AGNEW ASSAULT ON THE NETWORK NEWS OFTEN SOUNDED TO ME LIKE AN AFFILIATE STATIONS' CONVENTION, AND MORE THAN A FEW STATION OWNERS ALWAYS GAVE MORE THAN MORAL SUPPORT TO THE WHITEHEAD CARROT-AND-STICK FORMULA FOR PERPETUAL LICENSE RENEWAL IN RETURN FOR CONTROL OF CRONKITE AND CHANCELLOR. THE RECORD OF A.B.C.'S RESISTANCE TO GOVERNMENT

PRESSURE NEVER APPROACHED THAT OF FRANK STANTON OF C.B.S. AND JULIAN GOODMAN OF N.B.C. ONLY AFTER WATERGATE HAD NUMBED THE NIXON OFFENSIVE DID THE A.B.C. SPEECH WRITERS BEGIN TO DEFEND THEIR POSITION. A.B.C. TOP MANAGEMENT IS STILL WOBBLY. RECENTLY WHEN THEIR DOCUMENTARY UNIT UNDER AV WESTIN, WHICH IS FINALLY PRODUCING SOME TRULY INVESTIGATIVE REPORTING, HAD DONE A SEARCHING PROBE CALLED "FIRE," THE NETWORK BUCKLED UNDER A DEVASTATING COURT INJUNCTION. THE DOCUMENTARY INCLUDED THE BURNING OF AN INDIANA MANUFACTURER'S CRIB TO ILLUSTRATE ITS HIGHLY FLAMMABLE NATURE. THE INDIANA COURT IN A CLASSIC CASE OF PRIOR RESTRAINT ENJOINED THE NETWORK FROM SHOWING THAT PART OF THE DOCUMENTARY. A.B.C. LAWYERS AND ITS TOP MANAGEMENT GAVE UP -- JUST THE OPPOSITE POSITION THAT THE NEW YORK TIMES AND OTHER NEWSPAPERS TOOK IN THE PENTAGON PAPERS PRIOR RESTRAINT CASE. SINCE THE CUT VERSION OF "FIRE" WAS BROADCAST, A.B.C. HAS APPEALED THE INDIANA RESTRAINT BUT THEIR ACQUIESCENCE, NO LESS THAN THAT INDIANA JUDGE'S INJUNCTION IS A SELF-INFLICTED WOUND AGAINST THE RIGHT TO REPORT A VISIBLY PROVABLE TRUTH.

OF COURSE, SOME OF THE WORST VIOLENCE TO THE IDEA OF THE FIRST AMENDMENT IS THE PRODUCT OF EXCESSIVE COMMERCIALISM. THE AVERAGE CITIZEN HAS DIFFICULTY COMPREHENDING HOW MADISON'S PRINCIPLES APPLY TO A BROADCASTER WHO SAYS THE FIRST AMENDMENT SHIELDS HIM FROM LAWS WHICH WOULD LIMIT VIOLENCE IN CHILDREN'S COMMERCIALS. ONCE LONG AGO BEFORE CIGARETTE ADVERTISING WAS BANNED, A NETWORK LAWYER TOLD ME IN ALL SERIOUSNESS THAT THE GOVERNMENT WOULD

VIOLATE THE FIRST AMENDMENT IF IT PROHIBITED CIGARETTE ADVERTISING DESPITE THE SURGEON GENERAL'S REPORT THAT SMOKING CAN KILL YOU.

THE PUBLIC, TOO, IS CONFUSED BY THE SAME BROADCAST NEWSMAN WHO PLEADS THE PROTECTION OF THE FIRST AMENDMENT MIXING HIS REPORTING DUTIES WITH HIS PITCHMAN FUNCTIONS. IT IS ROUTINE ON MANY STATIONS AND ONE NETWORK TO HEAR A REPORT ON OLD AGE PROBLEMS FOLLOWED BY THE SAME NEWSMAN SHILLING FOR A RETIREMENT VILLAGE, OR WATCHING THE SAME REPORTER VIEWING WITH ALARM THE ENERGY CRISIS AND THEN SOLVING IT WITH A PITCH FOR THAT GIANT GASOLINE CORPORATION OR THE LOCAL POWER COMPANY. THERE'S NOTHING WRONG WITH COMMERCIALS ALTHOUGH 16 OR 18 IN AN HOUR IS OBSCENE, BUT WEDDING THE SPONSOR'S MESSAGE TO THE REPORTER'S FUNCTION IS ENOUGH TO MAKE THE BEWILDERED CITIZEN WONDER WHOSE RIGHTS ARE BEING ABUSED. FOR SURELY THERE IS A CITIZENS' RIGHT TO HEAR AND TO KNOW WHAT HE IS HEARING AND WHO IS PAYING FOR IT.

ANOTHER REASON FOR PUBLIC UNEASINESS WITH THE NEWS MEDIA IS JOURNALISTS' SELF-RIGHTEOUS PREACHING THAT THEY ARE PART OF A NOBLE AND DISCIPLINED PROFESSION DEDICATED TO TRUTH, FAIRNESS, IMPARTIALITY, AND THEN ACTING LIKE MEMBERS OF ANY OTHER BUSINESS OR TRADE UNION WHENEVER THE URGE TO POSTURE IS APPROPRIATE. I CANNOT DEFEND THOSE WHO PREACH FREEDOM OF SPEECH FOR ALL, AND THEN REFUSE MICROPHONES AND CAMERAS TO PROFESSIONALS LIKE BILL BUCKLEY UNLESS HE JOINS THEIR A.F.T.R.A. UNION. NOR CAN I DEFEND THE NEWSPAPER GUILD'S RESOLUTION DEMANDING THE IMPEACHMENT OF PRESIDENT NIXON. AS INDIVIDUALS THESE NEWSMEN AND WOMEN CAN

VOTE FOR ANY CAUSE OR PERSON THEY CHOOSE, OR THEY CAN SIGN WHATEVER PETITIONS THEIR CONSCIENCE PROMPTS, BUT WHEN, AS THE CHOSEN REPRESENTATIVES OF UNIONS WITH MEMBERS OF DIFFERING PERSUASIONS, THEY INVOLVE JOURNALISM IN PARTISAN POLITICS, THEY DO SO AT THEIR PROFESSION'S PERIL. AND SPEAKING OF CONFLICTS OF INTEREST, LIKE DIRTY TRICKS, THEY ARE NOT THE EXCLUSIVE DOMAIN OF POLITICIANS. THE SO-CALLED JOURNALISTS WHO MOONLIGHT FOR THE LOCAL BREWERY, HOME FOOTBALL TEAM, OR THE C.I.A. ARE CONDUCTING UNFAIR PRACTICES WHICH THEIR EMPLOYERS AND THEIR PUBLIC OUGHT TO FIND UNACCEPTABLE.

PERHAPS THE MOST PERMANENT DAMAGE SOCIETY WILL SUFFER FROM THE WHITE HOUSE CAMPAIGN AGAINST THE NEWS MEDIA IS THAT IT HAS CREATED AN ATMOSPHERE SO POISONED THAT ALL FAIR CRITICISM OF BROADCASTERS AND NEWSPAPERS IS AT ONCE DISMISSED AS JUST MORE GOVERNMENT HARASSMENT. WHEN CHALLENGED FOR PUBLISHING HARMFUL GRAND JURY LEAKS, THE PRESS DECRIES CENSORSHIP. CLAIMS OF FIRST AMENDMENT INTERFERENCE ARE USED AS THE HANDY SMOKE SCREEN AGAINST ALL ATTEMPTS AT REGULATORY REFORM TO ESTABLISH LONG-RANGE POLICIES FOR CABLE AND MORE EFFICIENT USE OF THE ELECTROMAGNETIC SPECTRUM. IF THE CHAIRMAN OF THE F.C.C. IN 1973 MADE THAT SPEECH DESCRIBING TELEVISION AS A "VAST WASTELAND," AS NEWTON MINOW DID IN 1962, HE WOULD PROBABLY BE CRUCIFIED.

THERE IS NO EXCUSE FOR THE EPIDEMIC OF WOUNDS WHICH JOURNALISTS SEEM TO INVITE, HOWEVER UNWITTINGLY, IN REACTION TO THE DISEASE THAT NIXON CULTURED AND AGNEW CARRIED.



THE ANSWER TO EXECUTIVE PRIVILEGE IS NOT NEWSMAN'S PRIVILEGE. THE CAMPAIGN FOR REPORTERS' ABSOLUTE SHIELD LAW IS A FUTILE QUEST WHICH, EVEN IF SUCCESSFUL, WOULD ONLY SERVE AS A "SHIELD" OF DAMOCLES. PERMITTING CONGRESSMEN TO LEGISLATE IMMUNITY FOR JOURNALISTS GIVES THEM THE ENTERING WEDGE INTO THE BASE OF FREE SPEECH. IF THEY CAN "PROP UP" THE FIRST AMENDMENT WITH A CRUTCH IN 1974, THEY CAN TAKE IT AWAY IN 1984. WALTER LIPPMANN WHO LEARNED HIS INVESTIGATIVE REPORTING FROM THAT ORIGINAL MUCKRAKER, LINCOLN STEFFENS, NEVER DEPENDED ON SHIELD LAWS. "IN THE JOURNALISTIC WORLD I GREW UP IN, IT WASN'T A QUESTION OF WHETHER YOU HAD TO DIVULGE YOUR SOURCES. IT WAS A QUESTION OF WHETHER THE REPORTER HAD THE GUTS . . . TO GO TO PRISON IF NECESSARY (TO PROTECT HIS INFORMATION)."

THE FIRST AMENDMENT LIKE ALL THE BILL OF RIGHTS HAS SERVED US WELL FOR 183 YEARS IN SPITE OF THOSE WHO IN THE NAME OF NATIONAL SECURITY AND THOSE WHO IN THE NAME OF IMAGINED PRIVILEGES WOULD EXPLOIT IT. AS WAR HAS BECOME TOO IMPORTANT TO BE LEFT TO GENERALS, AND THE LAW TOO VITAL TO BE LEFT TO LAWYERS AND EVEN JUDGES, THE FIRST AMENDMENT HAS TOO MUCH TO DO WITH THE FUTURE OF THE ENTIRE DEMOCRATIC PROCESS TO BELONG EXCLUSIVELY TO JOURNALISTS, PUBLISHERS AND BROADCAST MANAGERS.

NEWS IS THE MOST IMPORTANT CONSUMER ITEM AVAILABLE TO THE AMERICAN PUBLIC. WHAT YOU DON'T KNOW ABOUT IT CAN KILL YOU. IF YOU ARE SHORT-CHANGED BY "NEWS MERCHANTISERS," AS I.F. STONE CALLS THEM, REFUSING TO MAKE SUFFICIENT SPACE AND TIME AVAILABLE

FOR THE EXPLANATION OF VITAL AND COMPLEX ISSUES, YOU ARE BEING NO LESS MANIPULATED THAN IF PRESIDENT NIXON AND HIS ZEALOUS AIDES HAD SUCCEEDED IN CONTROLLING THE BIG SWITCH. WHEN THE CITIZEN IS OVERCHARGED AT THE SUPERMARKET OR THE USED CAR LOT HE IS CHEATED OF MONEY, BUT WHEN HE IS SHORTCHANGED IN THE QUANTITY OR QUALITY OF NEWS HE IS ROBBED OF HIS BIRTHRIGHT. SHODDY PRACTICES, CUTTING ROOM TRICKS, SO-CALLED "HAPPY NEWS" PRESENTATIONS, AND COMPROMISING JOURNALISM, CAN DENY YOUR FIRST AMENDMENT RIGHTS EVERY BIT AS MUCH AS CARROT-AND-STICK FORMULAS, DIRTY TRICKS, OR CHILL WINDS FROM DOCTRINAIRE COURTROOMS.

As 1972 WILL GO DOWN IN HISTORY AS THE YEAR IN WHICH CONSTITUTIONAL GOVERNMENT WAS ALMOST ABDUCTED, 1973 MAY BE REMEMBERED AS THE TIME WHEN THE FIRST AMENDMENT WAS CAUGHT IN A SENSELESS TUG OF WAR BETWEEN THOSE WHO DIDN'T RESPECT IT AND THOSE WHO REALLY DIDN'T UNDERSTAND IT. WITH A LITTLE LUCK, 1974 WILL BE THE YEAR IN WHICH THOSE IN THE AMERICAN LIVING ROOM, NO LESS THAN THOSE IN THE NEWSROOM AND THE COURTROOM DISCOVER ANEW THAT THE FIRST AMENDMENT IS TOO IMPORTANT TO BE ENTRUSTED SOLELY TO LAWYERS AND JOURNALISTS.

IT HAS BEEN SAID, BY JUSTICE LEARNED HAND I BELIEVE, THAT A CONSTITUTION WHICH ONLY A COURT CAN SAVE, CAN NO LONGER BE SAVED. IT IS ALSO TRUE THAT A FREE PRESS THAT ONLY AN ABSOLUTIST INTERPRETATION OF THE FIRST AMENDMENT CAN SAVE, CAN NO LONGER BE SAVED. IT IS PERFORMANCE, IN THE NEWSPAPER AND ON THE TV TUBE, WHICH WILL DETERMINE WHETHER FREE GOVERNMENT GETS THE KIND OF

FREE PRESS IT DESERVES, AND WHETHER THAT PRESS GETS THE  
KIND OF GOVERNMENT OUR SOCIETY DESERVES. THAT, AND ONLY THAT  
IS WHAT JAMES MADISON HAS BEEN TRYING TO TELL US.