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by
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I don't know why there is something more imposing about this speaking engagement than previous speaking engagements on this campus. I have spoken frequently in the School of Journalism and once in the School of Business, but somehow there is something about the law that intimidates me. Maybe that's because I've had a couple of brushes with the law. It is somehow different tonight. First of all, we're live on radio and we're being taped for campus television. That, of course, is intimidating itself.

Secondly, there is something about law school that makes it different than speaking on any other campus, and I guess it has to do with the word "law." It was two weeks ago that I got a letter from the Department of Justice telling me that after fifteen months I was no longer under investigation to see whether there was any kind of law to be thrown at me and it took a very long time before they decided there wasn't any. That, plus the fact that there was a point at which jail loomed as a rather imminent danger, makes me feel differently about the law.

I looked at the topic for tonight, "Limits on the Freedom of the Press." Yesterday, I asked Dean Bailey of the Journalism School, "who the hell ever chose that as the topic?," and he looked at me and said, "You did." I don't know why I chose that topic, except possibly that it was bait for the law school people; I knew that it would appeal to them. The other possibility was that, having done a great deal of public speaking in the past several months, I was looking for a rest, and wanted to get up and say, "My subject tonight is the limits on freedom of the press. I don't think there should be any. Thank you very much."

Actually, when I did choose that subject it was because I had wanted to put out a deliberately provocative subject: "Why is a re-

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porter talking limits on freedom of press?" The answer is because he's the only safe person to talk about it. As soon as you get judges talking about it or Congressmen talking about it, they talk about it in a somewhat more alarming context. My purpose tonight is to try to negotiate some kind of reasonable compromise with the law, to try to explain to you my view of what the permissible limits of freedom of press are. I don't expect that I'll have full concurrence with my views by everybody, but I rarely have full concurrence with my views anyway.

Let me say first that there have been threats to freedom of the press and that they don't come in the form of, "Let's threaten freedom of press." They're almost always stated in terms of public values, usually quite legitimate values. The one I was confronted with came from Congress and had to do with the fact that the House of Representatives had decided that a report which had been drawn up by its own Select Committee on Intelligence, a report that this committee had voted 9 to 4 to publish, should not be published. No member of the House outside the Committee itself had read the report, so the decision was not based on anything quite as rational as having gone into the subject and substance of it. It was a political decision. By political decision, I don't necessarily mean to be pejorative. The House of Representatives is a political body. It is politically elected and has political responsibilities.

They perceived, I think inaccurately, that they were in trouble because the investigations of the intelligence community had gone so far that a certain backlash had begun to build up. The White House began to make an election issue of this security-conscious Administration against a leaky House of Representatives, and there was a kind of panic in the House. In response to what they considered to be the mandate of their constituents, at least as represented by the American Legionnaires, they decided to forbid their own committee, to publish the report. Then, when I appeared to act in defiance of them and proceeded to publish a report that they did not publish, it became rather natural for them to pick me as a target amid a great deal of debate featuring the name of Benedict Arnold. Congressman Stratton of the State of New York, who introduced the resolution for a House investigation, told me himself that the initial idea was simply to have me cited for contempt of the House for having done what the House did not want done. And, weirdly enough, there exists a Supreme Court precedent allowing a chamber of Congress, if it feels that its legislative duties have been interfered with, to cite a citizen for

contempt for obstructing its legislative process.[1] They sentence you to jail just like that. However, they discovered that because of due process it could only be done after a trial.[2]

They contemplated having a trial for me in the well of the House of Representatives and they went so far as to research that possibility. They then decided that was not exactly the way they wanted to go. They dropped the idea of a summary citation for contempt and decided instead first to investigate the source of the leak. They asked the House Judiciary Committee to do that and the Judiciary Committee said they would rather not. They then asked the House Rules Committee and they weren't really interested. So they found the House Ethics Committee, which later became very busy with Wayne Hays and other important matters. Up until that point the Ethics Committee had done nothing. And, I must say, first they tried to exercise their responsibility without crossing that tenuous line that separates the responsibility of Congress from the responsibility of the press.

They interviewed some four hundred witnesses including members and staff of the House, the staff of the committee, and people from the CIA and elsewhere in the Executive Branch to see if they could trace the source of the leak without having to cross that constitutional Great Divide and call in a reporter to ask him, under the threat of contempt and jail, "Where did you get that report?" But they didn't succeed in the seven months of their investigation, and finally, they did call me.

The House Ethics Committee had been told to find out why it is that the House of Representatives can't keep its secrets. The only way they could find out was to go to somebody who had published the secret. That was their mission, that was their mandate, they regarded that as a legislative necessity and within the proper domain of the House of Representatives. The House couldn't perform its business, it couldn't keep its secrets, and if it required calling a reporter to find out why, that was what they were prepared to do. But perhaps without realizing it, they were invading constitutional rights.

So they called me and in the end we faced the moment where I was asked, "Where did you get that report?" They knew what was going to happen. I said, "I can't tell you." I was asked nine different ways, and nine different times. I was warned that my refusal to answer would subject me to a citation for contempt. It was a very seri-

1. *See* Walkins v. United States, 354 U.S. 178, 215 (1957); Jurnoy v. MacCracken, 294 U.S. 125, 128 (1935).

2. *See Walkins*, 354 U.S. at 209.

ous matter and it had what we call a "chilling effect." Calling a reporter and subjecting him to the threat of contempt has to have a chilling effect on the exercise of our press freedoms. Had they succeeded and I'd gone to jail, it would have been a lot more chilling, especially for me.

We held them off. They didn't proceed, finally; they didn't have the votes on the floor of the House because public opinion had swung in the meanwhile. But it isn't as though you win a victory that stays won. It was one of the examples where Congress, perhaps not quite realizing what they'd done, had encroached on one of the really fundamental and sacred freedoms—freedom of the press—by trying to find out my source.

One of the other things I found out, travelling around our country, talking about this matter (and even occasionally listening), is that people who want to be supportive don't understand why some of these things which seem so small and parochial become so important. With a great many people I've talked to in various audiences the question arises, "If you think the public has a right to know everything, then why don't they have a right to know where you get your news?" That makes sense on the surface of it. They're very interested to know where you get something like that. They say, "Congress wants to know and they should know, and we want to know and, by the way, who was Deep Throat? Why can't we know things like this?"

There is a tension between various elements in our society. There is a natural wish of Congress and a natural curiosity of the people at large to understand everything they can. You have to understand that, however contradictory this sounds, there are certain things that those engaged in trying to give you all the information still have to keep secret.

It may seem to be a contradiction, but it really isn't because if you can't keep your source of information secret, you would not acquire the most essential information that you want to give. If on one occasion you are forced to betray a source that you promised to protect, then all your sources dry up. The entire system of unofficial communication of information begins to break down, and I think that system of unofficial communication is more important than people realize. You live today in an age with a great number of people not understanding other people, of groups in society which are set at sword's points, and part of the reason they are set at sword's points is that there are walls between people.

An example of this is the *Branzburg-Caldwell* case.[3] It involved a reporter named Earl Caldwell who was in touch with the Black Panthers. He wanted America to understand them. They obviously weren't going to go to the prosecutors, the police, or the F.B.I and talk about things which they had done that were illegal. They had a grievance, and if there was any way of ever bringing America together, it was for the large majority of the American people to understand a little bit about what drives more minorities to doing such desperate things as carrying guns, making threats, and other illegal acts. Caldwell was a safety valve.

Another one of our safety valves, for Catholics, is to go to a priest and confess. Because a safety valve is so important, the law protects the right of the priest to keep confidential what he hears from the person who has confessed, even though it may involve something the police would like to know. In fact, the law itself, has the most sweeping protection of privilege, because, by God, lawyers wrote it. There's also a certain recognition of privilege with regard to doctors and their patients. The reason that this privilege exists is that if it didn't exist the whole system wouldn't work.

Now the fact of the matter is that certain alienated parts of America want to communicate to the rest of America because they need a long-range way to find some solutions to the problems that divide them. This rests on the ability to communicate in unofficial ways, and one of these is to say something to a reporter. They trust you, they tell you what's going on, and you don't tell the cops. Remember, if Caldwell knew he had to tell the cops then he would say to the Black Panthers, "Don't tell me because I'm going to be forced to tell."

If we're going to have a system in which reporters have to reveal their sources, the best thing is that they shouldn't have those sources. But then it is America which suffers. You could cut off that unofficial channel which crosses the barricades that exist between some groups in America and the majority of Americans. You just won't know what's going on. The first thing you'll know is that guns start going off or something else starts happening because there's been no communication. What is very hard for people connected with the law to understand is the positive value of the kind of channel that exists through the press in this country.

That brings me to my main point. I am not an absolutist about these questions of press rights. I understand that there are various

3. Branzburg v. Hayes, 408 U.S. 665 (1972).

important values in this country. I understand the right of a free press versus the right to a fair trial. Some people say it's the First Amendment versus the Sixth Amendment, which guarantees the right to a fair trial. And we constantly run into trouble.

My problem was with Congress. For others it is the Executive Branch. When the Pentagon Papers reached *The New York Times*, the Justice Department, on behalf of President Nixon, went to the courts and tried to get an injunction against publication. If there's anything that should be important to this country, it is that there should be no prior restraint on publication. This went to the Supreme Court and there was a decision that wasn't all that wonderful, but it did permit the publication of the Pentagon Papers to go ahead.[4] However, if you read the decision carefully, consensus was reached only on the idea that there was nothing grave enough in the Pentagon Papers to warrant an injunction.[5] That, for a lot of people, isn't a very happy solution to the problem because what it didn't give is an absolute statement that there can be no prior restraint. In fact, there was a suggestion that there could, under certain circumstances, be legally-valid prior restraint, that is, censorship in advance, telling you that you cannot publish something.[6]

Our main problem, oddly enough, is not with Congress, not with the Executive, but with the courts. That's strange since the courts, on the whole, have done a wonderful job of trying to protect American constitutional rights. Why is it then that we, who are trying to exercise those rights, argue with the courts? Why the gag orders in Nebraska[7] or the jailing of people in Fresno[8] because they refuse to reveal their sources? Why is it that the courts which, on the whole, have done a pretty good job of trying to maintain the rights of Americans, are up against the press, which is also trying in its own way to keep America free?

It is because the press, which can fight pretty well against a lot of other adversaries, finds it hard to fight the courts when they say that there is an argument between your Amendment and our Amendment, the First and the Sixth.[9] There's a tension between the need for jus-

4. New York Times Co. v. United States, 403 U.S. 713 (1971).

5. *Id.* at 719, 730.

6. *Id.* at 729, 733.

7. Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

8. Rosato v. Superior Court, 124 Cal. Rptr. 427 (Cal. Ct. App. 5 Dist., 1975), *cert. denied*, 427 U.S. 912 (1976).

9. U.S. Const. amend I ("Congress shall make no law . . . abridging the freedom of speech, or of the press"); U.S. Const. amend VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury").

tice and the need for public information.[10] And so we (meaning the courts) will decide that. This means that the courts, which are in a sense a party to a very important dispute, are also the referee in that dispute. They see things their way. The average judge tends to see the importance of being able to conduct his trial properly and he sometimes sees it as necessary to declare somebody in contempt or issue a gag order simply because he's trying to do his job. He understands something about our job, but he clearly, for quite human reasons, sees his job in more specific and clear terms. So when a judge says to you, "Look, I'm just trying to make sure everybody gets a fair trial," it would seem to be an unarguably just premise.

But, I submit, the premise is arguable. I would even go so far as to say that not in all cases is the conclusion of a fair trial the most important thing that could happen in this country. It sounds like a strange thing to say, but for many reasons a lot of trials don't end. If the evidence is tainted or if something happened and the judge feels the trial should not continue, then cases get thrown out and a lot of people who would be considered guilty in a general and moral sense, go free. So it isn't true that every person must get a complete trial. It isn't true that this is the only important value in American society.

Immunity was given to John Dean[11] and the special prosecutor, Archibald Cox, didn't like that[12] because he thought it would interfere with his investigation.[13] He went before Judge Sirica and tried to get the public hearings of the Senate Watergate Committee stopped altogether.[14] Then he tried to get them held off television.[15] Finally, he went in with the suggestion that anybody who was given immunity, or partial immunity as Dean was, should at least have to testify behind closed doors[16] so that his testimony would not confuse the prosecution.[17] Sirica called a hearing and obviously had a very strong predilection towards granting that request, because judges believe in what

10. *See* Robert Berger, *The "No-Source" Presumption: The Harshest Remedy*, 36 AM. L. REV. 603 (1987) (providing an evaluation between the need for justice and the need for public information). *See also* James C. Goodall, *Protecting Sources and Defending Libel Actions*, Series PLI Order No. 64-3792, June 19, 1986; Branzburg v. Hayes, 418 U.S. 364 (1971).

11. *Application of U.S. Senate Select Committee on Presidential Campaign Activities*, 361 F. Supp. 1270, 1272, 1282 (D.D.C. 1973).

12. *Cf. id.* at 1272, 1277.

13. *See* PATRICIA ANN O'CONNER, THE IRAN-CONTRA PUZZLE 60 (1987).

14. Application of U.S. Senate Select Committee on Presidential Campaign Activities, 361 F. Supp. at 1279.

15. *Id.*

16. *Id.*

17. *Cf. id.* at 1278.

other judges do. That's a normal thing. But the Senate Watergate Committee argued, "First of all, we think it's exceeding your powers to issue orders to Congress as to how it conducts its investigation."[18]

The argument was also made that it may well be more fundamentally important for America to find out what happened in Watergate than for one, two, three, four, or five people to go to jail. If the price of public information on something like that should happen to be that a couple of culprits go free, maybe that price is worth paying.

Today, in what is called a media age, there is nothing quite as important as how people perceive what is going on. And, while I don't think that in most cases the information prejudices trials, lawyers have a tendency to exaggerate. Lawyers always come in and say that if there is anything in the papers, their client can't get a fair trial. In most cases lawyers tend to exaggerate that and they'll admit it when you have a drink with them. But they have to make the argument.

There are very few examples where publicity has a demonstrable effect. In the case of the trial of John Mitchell and Maurice Stans before the Watergate trial and the investigation of Robert Vescfo, it was claimed they couldn't possibly get a fair trial because of all the publicity it had been given. And, perhaps proving them right, they were acquitted.[19]

But there are a lot of things you can do. You can sequester a jury; you can change from one city to another.[20] There are a lot of things you can do before you have to resort to silencing the press. Now, I don't think that we should say without discussion that if a trial is involved the press has to take a back seat. Not always. I value fair trials; I value justice. But, I would submit that there is a very real value in American society right alongside the value of seeing justice done. They come into sharp conflict. There is a decision to make, and that decision need not always be that a fair trial is more important than free information simply because the one who decides is the judge.

Then, if so far I've talked about what I do not consider to be permissible limitations on freedom of the press, I owe it to you to say where I do see limitation on press freedoms as a necessary thing. I speak to many large groups and inevitably there arises the question,

18. *Id.* at 1280, 1282.

19. United States v. Mitchell, 372 F. Supp. 1239 (2d Cir. 1973).

20. Rideau v. Louisiana, 373 U.S. 723, 726 (1963) (Court held that it was a denial of Due Process to refuse a request for change of venue because of TV publicity surrounding the trial).

"Since you published the report and know a lot of things the CIA does wrong, is there no limit on disclosing the nation's secrets? Would you publish anything, would you broadcast anything you have?" This question involved a series of basic misunderstandings.

Behind that question, first of all, is an attribution of omniscience to me which isn't entirely warranted. It's not as if I can learn anything I want to know and then I decide what to broadcast and not to broadcast. As a matter of fact, most of the nation's secrets—and this may come as a big shock to you—I do not get to know. Those secrets which a reporter gets to know usually shouldn't have been secrets in the first place. The only reason you get to know this is that there is somebody in the government who says, "This is for the birds. It's an embarrassment; it's not a secret." Most of the secrets that come out are things that shouldn't have been a secret anyway.

When something reaches me as a reporter (I've said this before, and I don't know if it would be better understood in Law School than it was in Business School or a lot of other schools) the question has to be, "Would you publish anything you get? Would you reveal any of the nation's secrets, no matter what?" The first principle which I have to establish—and which is so very hard to establish—is that information that reaches me isn't a secret anymore by virtue of the fact that it has reached me. I am a reporter and don't represent the intelligence community or the Pentagon. I represent the public. When information reaches me it is already unsecret by virtue of the fact that I have it. Not only because of that; but because if I have it, I'm pretty sure Seymour Hirsh has had it yesterday and the KGB last week. And not only because nothing reaches me which isn't probably available to other reporters, but also because it isn't my function or prerogative to classify information.

That has been so hard for me to get across to people. I am not a government official. I don't classify. My job is to find out what is going on the best I can. It is ipso facto (I got that phrase from law school) not a secret at the point when it reaches me.

Now everybody has questions about disclosure versus national security. I would submit to you that we have a very big government taking care of national security. And very strong courts are taking care of justice and gag orders. I think the real limitation that we have to consider on freedom of the press should be the exercise of responsibility by the press in matters where there isn't a big institution to provide protection.

What I'm talking about is the privacy of the average, individual citizen. I think that is being eroded a lot faster today than is national

security. I think we live in an age of enormous public interest in gossip; and gossip implies prying into people's lives. And the press has become extremely adept at prying. They know what levers to push, the place to go to find out people's credit ratings; they know the people to call to find out who's sleeping with whom and what's going on. The result of this is that there is a great deal of material in some papers and some local stations that can only be classified as gossip damaging to individuals without any essential importance in terms of public information. I think of horrendous questions that arise in newspaper offices like, "Do we publish the name of a rape victim?" These are questions the Supreme Court is loath to interfere in. They don't want to make freedom of the press issues out of them. But precisely because the legal protection of privacy is not very strong, I would say it's an area where the press must exercise its own responsibility, because there is nobody else to protect the average citizen except us.

I'll give you a couple of examples of problems that I face in that connection very early in my career as a Watergate investigator. I got a piece of information that was interesting it its own way. You recall that they had two bugs in the Watergate building in the Democratic headquarters, one on Larry O'Brien's phone which didn't work very well and another on the telephone in the office of Spencer Oliver, who was the Democratic liaison to state Democratic Committees.[21] He didn't spend a lot of time in the office and for some reason it was to his [Oliver's] phone that the girls went if they wanted to make private calls.[22] Oliver's secretary and various other secretaries around the office used to go in and use that phone.[23] Across the street in the Howard Johnson Motel sat Alfred Baldwinn III, a former F.B.I. agent, and with earphones on his head and a typewriter, typing it all down.[24] He finished and made a report, which was called the Gemstone Report, and brought a copy over to the committee to Reelect the President.[25] A copy went over to Haldeman at the White House, and eventually a copy ended up in the office of the prosecutor when they began investigating; and since I had friends, I got to see a copy of it.

Gemstone had nothing in it of any political importance. There was nothing in it that had to do with the campaign or anything like that. But there was an awful lot of girls talking to friends about how

21. Anthony Marro, *Deep Throat, Phone Home*, WASH. POST, Nov. 25, 1984.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*

they scored last night. And I looked at this material and said, "Is this news?"

If you want to know for what they spent a quarter of a million dollars, got seven people arrested, and the Nixon Administration overthrown, it was for a couple of secretaries talking about how they got laid. In a sense it had a kind of marginal interest. But I decided there was an interest in protecting the people whose privacy was being violated by being wiretapped and that for me to make a story about it would represent a further invasion of their privacy. And while it would be a great story for the National Enquirer, I decided to forget the story.

Occasionally there are borderline stories to worry about. I had a terrible problem when I came across the fact that the Senate Intelligence Committee was investigating assassinations. One of the biggest questions was what the presidents knew about assassination. You don't find in the files of the White House a memo in which President Kennedy says, "I want Castro bumped off. Please report before the close of business on Friday." They don't write those kinds of memos. The Senate Intelligence Committee had a great deal of trouble trying to find out to what extent the CIA was acting on its own and to what extent it responded to Presidential orders. That meant a peculiar problem at one point.

The CIA had been involved with the Mafia in trying to assassinate Fidel Castro.[26] There was a Mafia girl by the name of Judy Campbell. She met President Kennedy and he used to go to bed with her all the time at the Mayflower Hotel in Washington. The Committee was looking into that only because of the questions, "Could Kennedy have known from her, since she was a friend of the Mafia? Could they have discussed the assassination of Castro, in which case Kennedy would have known." They finally decided that they probably had not. That is to say, they had testimony that she didn't know about the assassination plots, whatever other subject they might have discussed.

But I had the problem that, on a tip from the Senate Intelligence Committee, I got to know about President Kennedy and Judy Campbell. And I hate stories about Presidents and their private lives. I just hate that kind of story. Suppose it was a story about the President being blackmailed by the mafia or a story about whether the President knew about assassinations. That would be a different story. I agonized about it because sometimes the distinction between an invasion

26. *Hall of Shame; Stuff and Nonsense*, INSIGHT MAG., Mar. 19, 1992, at 27.

of privacy and a *necessary* invasion of privacy is important if the country is to know what is going on in government. This isn't an easy question. But what I'm trying to say is that these are day-to-day decisions; they come up in various forms and aren't always easy.

I wish we had a better understanding with the courts and the legal profession. I would like to try to understand their problems and I wish they had a better understanding of the needs of those who provide public information. And I think that might happen, I think there might be something afoot. There are a whole lot of stories which newspaper people voluntarily agree to forget. There are a lot of appeals that can be made to the press without the threat of jail and gag orders. For example, we could hold off a day on a story, or not give part of it too much attention, because it would scare away a witness.

I think that in our society, whenever you're trying to find an absolute solution, something goes wrong. You violate somebody's rights and somebody ends up a revolutionary. In most cases, there are accommodations that could be reached once you get sufficient understanding. I want you lawyers to know that I'm willing to understand your needs; but don't arbitrarily impose your needs on us just because you have control over the writing of the laws and control of the courts. Don't arbitrarily impose your needs on us and send some reporters to jail—this will accomplish nothing. They'll go to jail, most of them, and stay there because they have to stay there. In this country, the rule of law will not survive unless the press is free enough so that this country knows what is going on. Thank you.