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ABSTRACT

A compendium of legal actions affecting the First Amendment and freedom of information interests of all the media on the federal, state, and local levels, this newsletter contains 316 indexed summaries of "Media Law Reports." The abstracts are arranged in 10 categories: prior restraints on publication and distribution, freedom of information, confidentiality of news sources, fair trial-free press/access to the courts, privacy and libel, right of reply/access to the media, the broadcast media, labor, high school and college press, and miscellaneous developments. (TO)

DECEMBER – JANUARY

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77 pages: 316 indexed summaries of
Media Law Reports

Compiled and distributed as a public service by

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
LEGAL DEFENSE AND RESEARCH FUND
WASHINGTON, D.C.

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

LEGAL DEFENSE AND RESEARCH FUND

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THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS. . . IS

The only legal research and defense fund organization in the nation exclusively devoted to protecting the First Amendment and freedom of information interests of the working press of all media.

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The organizational premise of the Committee is that the Constitutional interests of working news reporters, news editors and photographers may be different from the legal interests of other institutional organizations involved in freedom of speech and press problems.

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Steering Committee members perform on a volunteer basis. Generally, legal representation is performed on a pro-bono publico basis by law firms. The Committee provides *funding, legal advice, representation,* and *research* services on both litigative long-term and emergency short-term bases to individual reporters and to the working press as a class. No donations are asked from individual reporters who benefit specifically from the Committee activities. The Committee is mainly funded by grants from major media organizations.

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The Committee welcomes complaints about serious infringements on the legal rights of the working press, and welcomes inquiries about its activities: Write c/o Room 1310, 1750 Pennsylvania Avenue, N.W., Washington, D.C., 20006; Telephone Jack Landau at 202/298-7460.

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NOTE: The Reporters Committee has available *court opinions, briefs,* and *case citations,* pending *bills,* legislative *analyses, clips* or other background information for most items reported in this *Newsletter.*

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FYI—MEDIA ALERT

Enclosed please find the **December - January** edition of the *Press Censorship Newsletter*, a compendium of legal actions affecting the First Amendment and freedom of information interests of all the media on the federal, state and local level.

We particularly call to your attention the following developments and trends:

•The provisions of the amendments to the Freedom of Information Act which should discourage the **delay and red-tape** encountered by the media in using the Act as passed in 1966. (p. 15)

*The Omnibus Privacy-Secrecy Bills now pending in both the House and the Senate which would seal **all "personal" records** of persons who have government contracts or who are otherwise grantees of government funds. (p. 51)

•The increasing momentum under the guise of privacy to **seal public record arrest and conviction files** on the federal, state and local levels. (p. 52)

*The evidence alleging that the Department of Justice **is not following its own guidelines** in issuing subpoenas to news reporters seeking confidential information. (p. 39)

•The use by California police four times this year of **no-notice search warrants** to search media offices, rifle files and remove news information as a method **to avoid the California shield laws** which prohibits forced disclosure of confidential news sources. (p. 30)

*The **continued use of broad-gag orders** by courts barring news media access to public court records and proceedings and even barring editorial comment on cases, with two gag order test cases now pending at the Supreme Court. (p. 5)

•The continuing effort to impose **both criminal penalties and prior restraint publication orders** against any media organization which obtains any **"national security"** information without the government having to show that the information would pose a danger to the nation's security.(p. 17)

*Two pending Supreme Court cases on the question of whether private individuals involved in "public events" **can sue the media** for alleged invasions of their privacy. (pp. 53-54)

•The use of state criminal justice system employees to attempt **to intimidate the media** for critical investigative reporting (i.e. the **indictment** of two Indiana reporters, the **arrest** of a Kentucky policemen charged with burning down the Whitesburg, Ky. *Mountain Eagle* newspaper, the **arrest** of two Louisville, Ky. reporters, and the denial of **police passes** to established black and underground newspapers). (pp. 27-28)

*The new federal rules of evidence which, if the Senate version is accepted, would bar the media **from pleading state shield laws** before federal grand juries and before libel case juries seeking confidential information. (p. 35)

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I PRIOR RESTRAINTS ON PUBLICATION & DISTRIBUTION

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In October, 1973, Susan Stranahan of *The Philadelphia Inquirer* reported that a defendant in a perjury trial was also under indictment for conspiracy to murder a government informer. U.S. District Court Judge J. William Ditter later issued an oral order directing all reporters not to mention the other indictment. Violation of the order would subject the Philadelphia media and their reporters to contempt charges, the judge said.

Judge Ditter subsequently issued a written order. The *Inquirer* challenged the order and the U.S. Court of Appeals temporarily stayed it pending resolution of the appeal.

The newspaper argued that the silence order violated the First Amendment freedom of the press guarantee in that it constituted a prior restraint on publication. It also maintained that the district court's initial order was entered without proper procedural safeguards of notice and a hearing.

On Aug. 8, the U.S. Court of Appeals for the Third Circuit used its supervisory powers over the lower federal courts to void the district court's order. The court said the order was procedurally deficient because it was not in writing, was without notice to the press and did not afford the press an opportunity to be heard.

This marked the first time that a federal appellate court has overturned a gag order directed against the press by recognizing the press' right to be notified and consulted in advance about orders limiting their rights to report on public record trials.

The majority opinion said "the district court should have vacated the oral order, held a prompt hearing after notice to the involved members of the press and the parties, and, if a silence order was deemed to be justified, reduced such order to writing with specific terms and reasons and had it entered on the district court docket."

These procedural requirements, the court noted, are "particularly necessary" in cases where the order affects the press' First Amendment rights.

A concurring opinion signed by three of the circuit judges would have gone further and voided the order for lack of constitutional procedural due process of law under the 14th amendment. The concurring opinion said that procedural safeguards put into effect before publication was restrained would "increase the liklihood that decisions affecting First Amendment rights will not unconstitutionally impair the exercise of those rights."

"Different circumstances may well call for different procedures, but any procedure must be directed to the end of achieving a thorough and well-reasoned decision properly deferential to First Amendment interests."

In November, Judge Ditter appealed the decision to the U.S. Supreme Court. Briefs have also been filed by the *American Newspaper Publishers Association* and *The Reporters Committee.*

2. SUPREME COURT ASKED TO HEAR TIMES-PICAYUNE GAG ORDER CASE

A New Orleans judge ordered the press in June not to publish any editorials, investigative stories or open court testimony relating to a pre-trial hearing in a controversial criminal case (see *PCN V*, p. 17). The *Times Picayune* appealed to the Lousiana Supreme Court challenging the order as unconstitutional prior restraint of the press. In a 4-3 decision, the Lousiana Court refused to void the order.

The *Times Picayune* then appealed to U.S. Supreme Court Justice Lewis Powell for a temporary stay of the order. Powell granted the stay in July 24 insofar as it applied any direct prior restraints against the press, pending a full hearing of the case.

Subsequently, the *Times Picayune* filed an appeal for Supreme Court review. The Court has not yet said whether it will hear the case.

Briefs supporting the *Times Picayune* position have also been filed by the *American Newspaper Publishers Association* and *The Reporters Committee.* In its brief, *The Reporters Committee* argues that gag orders restricting the media from reporting public record court proceedings are void and may be violated by the media without concern about the imposition of sanctions. In addition, the *Committee* argues that gag orders issued in public court proceedings without notice to the news media affected by the order and without any opportunity to be heard during the formulation of the order violate the constitutional concept of due process of law and are therefore procedurally invalid. (See the story directly preceeding this one for a fuller explanation of the Due Process Proposal).

3. IDAHO JUDGE BARS NEWSPAPER FROM PUBLISHING ITS OWN DEPOSITIONS IN LIBEL ACTION

Ken Matthews, a reporter for the *Idaho Statesman*, did a series of investigative stories on the Idaho Endowment Fund Investment Board (see related story, this *PCN*, p.), a state agency which manages the investment of state funds. One story charged that a member of the board, a Biose stockbroker, was guily of a conflict of interest because his brokerage firm handled a large amount of state investment funds.

The stockbroker sued the *Statesman* for libel. At a pre-trial deposition session attended by Matthews, the stockbroker and their attorneys, the stockbroker objected to Matthews' attempts to record the session. He

then sought a court order barring all news reporting of the deposition.

A state judge subsequently issued an order restraining the *Statesman* "from making any comment" about what the stockbroker said at the deposition. The judge said that freedom of the press was "irrelevant" and that his responsibility was to protect the plaintiff from harassment.

The *Statesman* is planning to appeal the ruling.

4. OHIO REPORTERS HELD IN CONTEMPT FOR PUBLISHING NAME OF COURT WITNESS

In late June, a kidnapping trial began in the Court of Common Pleas in Fayette County, Ohio.

On June 25, Judge Evelyn Coffman orally ordered reporter Ed Summers of the *Washington Court House* (Ohio) *Record-Herald* not to publish the identity of a missing material witness who had been named in open court. Summers ignored the order, and the witness' name was published in the June 25 edition of the *Record-Herald*.

The following day, Coffman, citing the Summers article, declared a mistrial in the kidnapping case.

On July 16, the judge found Summers in contempt of court for violating the June 25 order. The judge stated that Summers' action "was calculated to and did impede the administration of justice." The judge also issued a gag order prohibiting law enforcement officials from making extra-judicial statements about any matters that might ultimately reach the court.

On August 30, a hearing on the contempt charge was held before Judge J. Donald Ratcliff of Ross County Court of Common Pleas. The court found Summers not guilty of contempt, holding that "a judge has no right to gag the press for (sic) reporting actions which occur within the courtroom." The order relating to the law enforcement officials was not challenged.

5. CALIFORNIA NEWSPAPERS AGREE TO SECRET WITNESSES IN CRIMINAL TRIAL

In October, during jury selection in the California trial of two convicts accused of killing a prison guard, the prosecutor requested members of the press not to print the names of the prosecution's inmate witnesses. The prosecutor said the witnesses' lives would be in danger if their names appeared in print.

The reporters refused to agree to the request, contending that anything revealed in open court should be subject to publication. Reporters also asked the prosecutor to give them advance notice of any motion for a gag order so that the press could obtain legal representation before the order was instituted.

Several hours later, in response to a prosecution motion and with no notice to the press, San Joaquin Superior Court Judge William H. Woodward issued an order barring several local newspapers— the *Stockton Record; Lodi News Sentinel, Tracy Press, Manteca Bulletin, Ripon Record* and *Escalon Times*—from publishing the names of prosecution inmate witnesses. The next day, the judge extended the order to include the *San Francisco Chronicle, Sacramento Bee* and *Sacramento Union*. The broadcast media and wire services were not affected by the order.

Four days later, on October 16, as attorneys for the *Stockton Record* and the McClatchy Newspapers (publishers of the *Sacramento Bee*) were preparing to challenge the order in an appellate court as a direct prior restraint on the press, Judge Woodward conferred with the attorneys and *Stockton Record* publisher Robert P. Uecker and issued a compromise order. The new order, accepted by the press, said that inmate witnesses would be sworn in chambers and would be identified in open court by aliases only.

NOTE: A similar order by a San Bernardino, California, trial judge barring publication of the names of inmate witnesses was voided by a state appeals court in 1973 (see *PCN I*, p. 6).

SUPREME COURT TO DECIDE CONVICTION FOR ABORTION AD

Awaiting Supreme Court decision after oral agruments this fall is *Bigelow v. Virginia*, a case involving the scope of First Amendment protection to which newspaper advertisements are entitled. Jeffrey C. Bigelow, editor of the Charlottesville *Virginia Weekly*, is appealing a conviction and $500 fine for publishing an advertisement for an abortion referral service in violation of a state law which makes it a misdemeanor to advertise "or in any other manner encourage or prompt the procuring of an abortion."

Bigelow is arguing that the statute should be declared unconstitutional because abortion is a constitutionally protected operation and therefore an abortion ad is fully protected by the First Amendment. The Virginia Supreme Court, however, has twice upheld Bigelow's conviction, on the ground that government regulation of commercial advertising in the medical-health field is permissible under the First Amendment, regardless of the legality of the operation (see *PCN IV*, p. 47 and *PCN V*, p. 23).

7. COURT LIFTS BAN ON SOUTH AFRICA JOB ADS IN N.Y. TIMES BUT SAYS ADS NOT PROTECTED BY FIRST AMENDMENT

In October 1972, a complaint was filed with the New York City Commission on Human Rights charging that *The New York Times* had violated a city statute by publishing advertisements for employment in South Africa.

The complaint alleged the *Times* was liable as an "aider and abettor" of employers who violated a law

prohibiting job advertisements which express "directly or indirectly" limitations as to race.

After a hearing, the Commission issued an opinion and an injunction on July 19, 1974 prohibiting the *Times* from printing any further ads recruiting employees for jobs in South Africa.

The Commission declared that the ads "expressed discrimination" by mentioning South Africa as the location of the jobs, although the ads made no reference to race. The Commission found in effect that the words "South Africa" had become code words for racial discrimination, because of that country's well-known white supremacy policies.

The *Times* appealed to the New York State Supreme Court, arguing the Commission's decision violated the First Amendment because it instituted government burden on the press, because ads for foreign employment control over what can be published.

The *Times* further claimed that if left standing, the Commission's decision would impose an unconstitutional burden on the press, because ads for foreign employment could not safely be printed without an investigation of the employment practices of the country involved.

On October 30, the court reversed the Commission's decision and lifted the injunction against the *Times*.

The court rejected the findings that the South Africa job ads were code words for discrimination and held that the Commission's action was in excess of its powers, which did not include oversight over foreign employment practices.

But the court rejected the *Times*' First Amendment arguments. Relying on the *Pittsburgh Press* sex-designated want ads (see *PCN II*, p. 21), the court found the ads fell within the area of commercial advertising and hence were unprotected by the First Amendment.

8. **WSB-TV ATLANTA: CRIME VICTIM-GAG** (See this *PCN*, p. 53)

PRIOR RESTRAINT AGAINST MARCHETTI BOOK CONTINUES SIX MONTHS

In April, U.S. District Court Judge Albert Bryan rejected in large part an effort by the government to censor portions of the controversial book on the CIA by authors Victor Marchetti and John Marks. He rejected all but 26 of the 168 deletions in the book sought by the government, but stayed that order pending appeal. (See *PCN IV*, p. 43 and *PCN V*, p. 20).

The result of that stay has been a prior restraint now continuing into its sixth month. The book—*The CIA: The Cult of Intelligence*—is now in its third edition with 168 blank spaces in place of the 168 deletions under litigation.

The Fourth Circuit Court of Appeals had agreed to decide the appeal in the case on an expedited basis. Although the appeals court heard oral arguments June 5, it has yet to hand down its decision.

291 DAY INJUNCTION VS ABC NEWS ENDS IN SETTLEMENT; ABC ABANDONS APPEAL 10.

In November 1973, a manufacturer of plastic baby cribs objected to a statement of an *ABC-TV* documentary on fire hazards entitled "ABC News Close Up—On Fire!" The company claimed the film segment, which showed one of its baby cribs being burned, was libelous and misleading because it condensed a 10-minute test into 40 seconds. The crib manufacturer obtained a trade libel injunction against the segment in an Indiana state court.

Complying with the injunction, *ABC* telecast the documentary on November 26, 1973 with the 40-second crib burning segment deleted. In its place ran a message that an omitted segment was then in litigation.

Apparently the first prior restraint against network news, the injunction was one of the longest prior restraints of any kind. It lasted 291 days.

Restraint Lifted

On June 14, 1974, an Indiana appeals court overturned the injunction as unconstitutional prior restraint. It rejected the crib manufacturer's argument that the regulated media are entitled to less First Amendment protection than other media and held that "subject to specified controls the basic concept of freedom of speech and freedom of press apply nonetheless to the broadcasting industry" (see *PCN IV*, p. 5 and *PCN V*, p. 20).

The crib manufacturer appealed to the State Supreme Court, with the result that the order overturning the injunction was stayed, and the prior restraint remained in effect.

Finally, on September 13, 1974, the injunction was lifted after 291 days. On that date the appeal was dismissed by consent of both parties. That evening's news carried the burning crib scene, updated to a 2-minute sequence that showed the burning of the plastic crib, followed by an attempt to burn a wooden crib.

NON-COMMISSIONED OFFICERS SEEK INJUNCTION AGAINST ARMY TIMES IN LIBEL SUIT 11.

In July and August, the *Army Times* newspaper, distributed to members of the armed services, ran a series of three articles in its bi-monthly "Family" magazine section discussing the insurance program run by the Non Commissioned Officers Association (NCOA).

In August, the NCOA filed a $10 million libel suit in federal court in Texas alleging that the articles were

"false, misleading and defamatory" in that they suggested "that NCOA is nothing more than a device to bilk noncommissioned officers out of their earnings by selling them high-cost life insurance."

In addition, the NCOA sought a permanent injunction against the *Army Times* prohibiting it from "publishing or representing false, misleading and defamatory material" about the NCOA or its activities.

No trial date has been set.

12. US COURT WON'T BAN CONSUMER AD INFORMATION

In June, the Denver Advertising Review Board, composed of local businessmen, convened an informal adversary proceeding to judge the fairness of an advertisement of Pat Walker's Ladies Slenderizing Salon following a complaint filed by the local Better Business Bureau.

Board decisions regarding advertisers who fail to conform to the Board's findings within 10 days are distributed to the news media and to interested government agencies as an incentive to compliance.

Walker's boycotted the hearing on the grounds that the Review Board lacked jurisdiction, acted in restraint of trade and the hearing method used lacked procedural due process of law.

After receiving notice of the Board's ruling against it, Walker's filed suit in federal court seeking a preliminary injunction to stop the distribution of a Review Board press release about the Walker's advertisement to members of the news media and the public.

In July, the court denied the injunction due to technical defect and because it was an unconstitutional prior restraint of the press.

13. WASHINGTON POST CRIME VICTIM SUIT

(See this *PCN*, p. 53)

14. SEC MOVING TOWARDS REGULATION OF FINANCIAL NEWS REPORTING & CONTENT IN TWO UNPRECEDENTED CASES

NOTE: Two recent cases raise the possibility that the entire area of financial reporting may be increasingly subject to prior restraints on content.

Under the two federal securities acts, companies, corporate officers, dealers and brokers are subject to numerous disclosure rules requiring them to convey "full and fair" information to the investing public. Until recently, there were few cases where these disclosure rules had any direct impact on the press.

Now, however, there are indications that the Securities and Exchange Commission is moving toward requiring financial reporters to disclose their stockholdings as a condition for reporting certain types of financial news.

The two cases discussed below are both unprecedented

One is the first civil fraud case filed by the SEC against a financial writer. The other is the first criminal prosecution of a financial writer under a little-used provision of the Securities Act of 1933.

The disclosure problem was a major issue in both cases.

Because of the potential securities law problems, many newspapers have fixed policies forbidding reporters to trade in the stock of companies they write about.

The only other known recent case of an SEC action against the news media involved *The Wall Street Transcript*, a weekly financial report consisting mainly of reprints of investment letters but containing some independent editorial content (see *PC* [illegible], p. 21).

In that case, the SEC claimed that the *Transcript* had violated the Investment Adviser's Act of 1940 by failing to register under the Act as an investment adviser. It claimed the *Transcript* was not a "bona fide newspaper" excluded under the Act. A district court dismissed the SEC complaint, but in 1970 the U.S. Court of Appeals upheld the SEC's right to investigate the press under the 1940 Act. The Supreme Court let the appeals court decision stand.

15. SEC FORCES CALIF. FINANCIAL WRITER TO CENSOR ANY STORY INVOLVING A STOCK HE OWNS

In July 1972, the Securities and Exchange Commission filed suit against Alex N. Campbell, columnist and former financial editor of the Los Angeles *Herald-Examiner*; charging him with fraudulently profiting from sales of stock purchased shortly before they became subjects of his column.

Also charged in the SEC civil lawsuit was Campbell's son, Alex N. Cambpell Jr., a former stockbroker who is presently editor and publisher of the *Western Financial Journal*, a monthly publication based in Los Angeles.

It was the first civil fraud action ever brought by the SEC against a financial writer.

The Campbells were charged under section 10(b) of the Securities and Exchange Act of 1934, which requires disclosure of all material facts in market information about a security.

The SEC alleged the Campbells "secretly and repeatedly made profits for themselves while defrauding other investors" by purchasing companies' stock, publishing articles about the companies and then quickly selling to take advantage of short-term price rises occurring after the articles appeared. The SEC alleged the Campbells did this more than 100 times over a five-year period.

The Commission sought a permanent injunction against the alleged violations and disgorgement of the alleged profits obtained.

Charges Denied

The Campbells denied the stock manipulation charges and contended that the articles in question had no effect on the prices of the stocks written about.

They also argued that an injunction would constitute a prior restraint abridging their First Amendment rights.

In response to the SEC's charge that the financial writers should have disclosed their position in any stock written about, the Campbells argued that such a disclosure would only have increased the likelihood that the price rises alleged by the SEC would ultimately have occurred.

In October, the case was settled by a consent decree one day before the Campbells were scheduled to go on trial in Los Angeles.

Without admitting or denying the charges against them, the Campbells agreed to the terms of a permanent injunction prohibiting them from trading in any security which they have reason to believe may be the subject of any publication, and directing them to disclose in any article they write any stock ownership in any company written about. They also agreed to pay $5,000 into a federal court. The SEC originally had sought $25,000.

The Campbells later denied violating any law and stated they agreed to the consent order to avoid further heavy legal expenses.

16. N.Y. FINANCIAL WRITER INDICTED FOR NOT DISCLOSING PAYMENT BY FIRM HE WROTE ABOUT; "ANTI-TOUTING" LAW USED

The September 29, 1972 issue of *Value Line Selection & Opinion*, a weekly investment publication, contained an article by William Eric Aiken strongly recommending the purchase of Power Conversion, an over-the-counter stock. Aiken, who was then editor of *Value Line*, wrote that the "heady multiple" being placed upon the stock appeared in line with the company's performance and prospects, and he described the stock as a "rewarding commitment" for venturesome investors.

On October 24, 1974, a federal grand jury indicted Aiken for failing to disclose in the 1972 article or elsewhere that he received a $15,000 payment from two dealers in the stock to write the article. The indictment was based upon the so-called "anti-touting" provision of the Federal Securities Act of 1933, which prohibits anyone from publishing an article about a security which he has been paid to write by an issuer, underwriter or dealer, without disclosing the payment and its amount.

Aiken's indictment is believed to represent the first prosecution of a financial writer under the provision.

Two dealers indicted together with Aiken were charged under the securities act with giving him the authorized payment.

All three men were also charged with mail fraud. Each faces a maximum penalty of five years in jail and a $1,000 fine on each of six counts of mail fraud, and five years in jail and a $5,000 fine on each of six counts of securities law violation.

DISTRIBUTION

LONG BEACH NUDE NEWSRACK ENJOINED 17.

California Superior Court Judge Roy J. Brown granted a preliminary injunction July 19 preventing enforcement of a Long Beach municipal ordinance banning sidewalk newsracks displaying pictures of nude bodies. The injunction was issued in response to a taxpayers suit filed by Bernice L. Hogan who claimed city funds were being wasted to enforce an ordinance she said violated freedom of the press. (For other newsrack suits, see *PCN V*, pp. 28-30).

FEDERAL COURT VOIDS PENN. NEWSRACK BAN 18.

In March 1971, the Swarthmore, Pennsylvania City Council passed an ordinance forbidding obstructions along streets and sidewalks to allow less congested passage in the city.

Swarthmore city officials notified the *Philadelphia Inquirer* in April, 1974, that two of their newsracks were in violation of the ordinance, and removed them. The paper filed suit in federal court.

The court entered a temporary restraining order barring enforcement of the ordinance pending a full hearing. The action marked the second time a federal court had considered the question of the constitutionality of city ordinances regulating the use and placement of newsracks along public streets (see *PCN V* pp.28-30).

A federal District Court Judge permanently struck down the ordinance August 8 as it applied to newsracks on First Amendment grounds. The court said that newsrack sales along public streets were a "constitutionally protected means of distribution." The court also noted the public's right of access "that is free as possible" to the means of distribution.

The court's opinion, however, left open the possibility of "reasonable regulation" of newsracks relating to:

- the size and location of news stands;
- aesthetic considerations and the appearance of newsracks;
- advertising to appear on the stands themselves.

Prior Restraints/Judicial

19. **FED. CT. CITES STUDENT PRESS CASES IN ALLOWING INMATE NEWSPAPER**

Authorities at the Vermont State Prison halted distribution of the January 1973 issue of a monthly newspaper published by inmates. The prisoners sued in federal court under the civil rights laws, seeking an injunction prohibiting interference with their publication.

In October 1974, the court ruled in the inmates' favor. The court found close analogies in the issues raised in cases concerning high school and college newspapers and then cited those cases in support of its holding that prison officials could not censor the content of the prison newspaper unless that newspaper threatened prison security, prison order or prison rehabilitation.

20. **GOVERNMENT'S EMERGENCY POWERS TO SEIZE FOREIGN NEWSPAPERS BEFORE SUPREME COURT**

In July 1969, Washington, D.C., resident Susanne Orin returned to the U.S. from a brief visit to Canada, crossing the border at Niagara Falls. Federal customs agents there searched her luggage and confiscated three paperback books published and printed in North Vietnam.

The three publications, *The Vietnamese Problem*, *North Vietnamese Medicine Facing the Trial of War* and *Literature and Liberation in South Vietnam*, were burned the same day by the agents, despite Orrin's insistence that they be returned to her and her refusal to sign a waiver form abandoning them. There was no hearing prior to the seizure or destruction.

Customs agents justified their actions citing violations of the Trading with the Enemy Act. The act prohibits unlicensed business transactions between Americans and North Vietnamese to cut off any economic benefit flowing from the U.S. to North Vietnam through the purchase of goods.

The Act is one of several hundred statutes giving the President broad economic and social control during periods of "National Emergency." The bill dates back to World War I and was reactivated in 1933 under President Roosevelt. Since then, the existence of a continuous national emergency has been ordered by Presidents Truman, Eisenhower, Kennedy, Johnson and Nixon.

Under the Act, certain materials may be licensed for purchase from North Vietnam, a process which takes about two months. In addition, gifts are exempted from coverage under the Act although the burden is on the gift recipient to prove the gift.

Orrin filed suit in federal court challenging the seizure and censorship of the books as an unconstitutional prior restraint of the press in derogation of the First Amendment.

On April 27, 1972, U.S. District of Columbia District Court Judge Barrington D. Parker upheld the government's seizure. The court said it was "sufficiently satisfied that regulation of the non-speech element is being effected in a narrow fashion so as to minimize any possible incidental limitation upon Plaintiff's First Amendments rights."

Orrin appealed to the District of Columia Court of Appeals which also upheld the seizure in June 1974.

The case is currently pending appeal to the U.S. Supreme Court.

SEARCH WARRANTS SEIZURES OF NEWS

PRIOR RESTRAINTS BY SEARCH WARRANT 21.
SEIZURES OF NEWS MEDIA FILES AND 22.
DOCUMENTS: STATION KPFK-FM, THE L.A. 23.
STAR, STATION KPOO-FM, THE BERKELEY 24.
BARB & THE SOONER STATE NEWS AGENCY 25.
(See this *PCN*, p. 30)

Legislative

NEWSPAPER BARS LOTTERY ADS 26.

A federal anti-lottery statute, 18 U.S.C. 1302, which was passed in the late 1800's, forbids the use of the mails to further a lottery.

Because of this statute, the *Bangor* (Maine) *Daily News* has suspended publication of advertisements for the Maine State Lottery. About a quarter of the *News* circulation is sent through the mail, and the newspaper does not have the facilities to print two different editions. Newspapers in the 13 states that presently have lotteries face similar problems.

On September 6, Attorney General William Saxbe warned the states that their lotteries may be violating federal law, including various postal regulations. The states claim that the federal lottery laws apply only to private lotteries and not to lotteries run by state governments.

There are presently four bills pending in the Senate which would exempt state lotteries from the federal anti-lottery laws. One such bill, S. 1186, was introduced by Sen. Richard Schweiker (R-Pa.). It has been before the Senate Judiciary Committee since March 1973. All four bills would permit the use of the mails to advertise and report the results of lottery drawings.

This controversy arose soon after the U.S. Supreme Court agreed to review a 1971 Federal Communications Commission ruling which held that radio and television stations cannot broadcast winning lottery numbers on

the day they're drawn and any advertisements about lotteries. The U.S. Court of Appeals for the Third Circuit struck down the ruling as it applied to the broadcasting of the winning numbers, but upheld the ban on lottery advertising (see *PCN IV*, pp. 42-43, *PCN V*, pp. 78-79).

NOTE: A compromise bill, H.R. 668, introduced by Rep. Peter Rodino (D-N.J.) passed the House Judiciary Subcommittee on Claims and Governmental Relations in early October. The bill, which is similar to the proposed Senate legislation, will be debated by full committee after the election recess.

27. HOUSE ARMED SERVICES COMMITTEE APPROVES PRESIDENTIAL CENSORSHIP PLAN BUT RULES COMMITTEE REJECTS IT

In 1950, Congress passed the Federal Civil Defense Act which gives the President broad emergency powers "whenever an attack on the United States has occurred or is anticipated." In October 1969, President Nixon issued an executive order which empowered the President, acting under the authority of the 1950 law, to establish a National Censorship Plan.

Under this plan, contended critics such as Rep. Les Aspin (D-Wisc.) and columnist George Will, the President can seize control of the nation's press. F. Edward Hebert, chairman of the House Armed Services Committee, disagreed: "Under this authority, the President cannot, I repeat, cannot control the media."

The law, which must be extended every four years, was approved by the House Armed Services Committee after thirty minutes of debate on July 25, 1974. The House Rules Committee held more extensive hearings on the legislation and, citing the bill's potential abuse, killed it on a 7-4 vote in September.

28. HOUSE SUBCOMMITTEE PUSHES BILL TO PUNISH MEDIA FOR CIA STORIES

The House Armed Services Subcommittee on Intelligence considering its bill (H.R. 18545) to amend the National Security Act of 1947, is planning further hearings this year to toughen its proposal to stop national security leaks (see *PCN V*, p. 60).

The bill was introduced by Subcommittee Chairman Lucien Nedzi (D-Mich.) and would require the director of the CIA to "develop appropriate plans, policies and regulations" for the dissemination of information.

The Subcommittee's earlier proposal to have the Attorney General prosecute violations of the regulations ran into trouble earlier this year when Justice Department officials testified that the bill did not confer penalties for violation of the regulations. The only penalties that would apply for violations of the Director's regulations under the Nedzi bill would be those penalties currently prescribed by existing criminal laws.

Subcommittee members hope to reach agreement during this session of Congress on a new wording of the bill to give the CIA additional statutory authority to penalize leaks of classified material.

NOTE: See *PCN V*, pp. 59-60 for other articles discussing the CIA's efforts to limit the Supreme Court's holding in the *Pentagon Papers* case which requires an evidentiary showing of a "clear danger" to the national security before any prior restraint on news reporting can issue against the media.

29. PROPOSED OFFICIAL SECRETS ACT STALLED IN SENATE (See this *PCN*, p. 17)

30. CIA PRESS INJUNCTION BILL STALLED

A draft amendment to the National Security Act proposed in July by CIA director William Colby is still pending in the Office of Management and Budget (see *PCN V*, p.59). The proposed legislation would allow the issuance of an injunction against publication of any news article containing information which the director of the CIA deemed as classified.

Media sources have viewed the Colby proposal as another attempt to legislatively void the *Pentagon Papers* decision which requires an evidentiary showing of a "clear danger" to the national security before any prior restraint can issue against the media.

31. DELAWARE SIGNED EDITORIAL BILL ADVISED UNCONSTITUTIONAL

The Delaware General Assembly enacted a bill to require newspaper editorials to be signed by their authors. The bill was accompanied by a synopsis giving the following rationale for the measure: "Because editorials are often written in an attempt to influence legislation or influence the outcome of an election, the public is entitled to know the identity of the person writing the editorial, so that people may better judge its merits."

In July, the Delaware Supreme Court advised that the law would be unconstitutional on its face as an abridgement of freedom of the press. The court's advisory opinion relied on a 1960 Supreme Court decision that anonymous handbills are protected by the First Amendment, a recent Maine decision striking down a similar signed editorial bill (see *PCN III*, p. 19) and the Supreme Court's recent decision in *Miami Herald v. Tornillo* (see *PCN V*, p. 1).

Delaware Governor Sherman Tribbitt announced that he would abide by the advisory opinion and not sign the bill into law. But he added that such legislation would not be proposed if "the press was very mindful of its power and concomitant responsibility."

32. NEVADA CAMPAIGN SPENDING LAW STRUCK DOWN AS UNCONSTITUTIONAL PRIOR RESTRAINT

In 1973, the Nevada state legislature passed a campaign spending law which required all newspapers, radio and television stations to keep separate accounts on advertising for political candidates and to file those records with the Secretary of State. The statute also barred the p. from accepting political ads from anyone but the candidate or "his authorized representative."

Challenging the law in a suit filed early this year, Cal Sunderland, publisher of the Winnemucca *Humboldt Sun*, claimed that the legislation burdened the press unnecessarily and placed the media in the role of policemen.

On October 9, a county District Court judge declared the campaign spending law unconstitutional, ruling that it "has a chilling effect on the process of legislative advertising, places a prior restraint on the publication thereof, and discriminates against specified media."

The state attorney general said he would not appeal the decision.

33. OKLAHOMA COURT VOIDS CHALLENGE TO PUBLICATION BAN OF NAMES OF DEAD VETS

In 1970, the Oklahoma legislature enacted a law which makes it a misdemeanor to display or publish the names of war dead "for the purpose of any anti-war, anti-police action or anti-draft demonstration." Violations were made punishable by a jail term of 30 days to one year, a fine of up to $500, or both.

A class action suit was brought in an Oklahoma state court seeking an injunction against enforcement of the statute and a declaration that it violated the First Amendment. The suit was filed on behalf of all persons intending to participate in an anti-war demonstration to be held in Cleveland County, Okla., on Labor Day, 1971, and on behalf of the state War Resister's League and the state chapter of the Vietnam Veterans Against the War.

The trial judge declared the law unconstitutional and temporarily enjoined its enforcement, but in January 1974, the Supreme Court of Oklahoma reversed without reaching the First Amendment issue. The court held that the class action plaintiffs had not met the proof requirements which are necessary in order to get an injunction in a case involving a criminal law.

An appeal was taken to the Supreme Court, but on November 11, the court declined review. That left the Oklahoma Supreme Court opinion, and hence the challenged law, in effect.

34. POLITICAL ADVERTISING CERTIFICATION REPEALED (See this *PCN*, p. 67)

II FREEDOM OF INFORMATION
Press Access to State & Federal Executive & Legislative Functions
The Presidency

1. FORD-NIXON TAPES AGREEMENT IS TEST CASE ON OWNERSHIP OF PRESIDENTIAL PAPERS

INTRODUCTION: WHO OWNS PRESIDENTIAL PAPERS?

The issue of whether a former President owns—and has the right of exclusive access to—documents prepared during his Administration has never been resolved.

Most past Presidents have treated their papers as their own property but most have also deposited their materials with the Library of Congress or in presidential libraries with varying provisions of public access.

In an agreement signed by General Services Administrator Arthur F. Sampson on September 6 (the day before the pardon), former President Richard Nixon was granted not only ownership rights but full authority to control access to all documents and tapes accumulated in the White House during the Nixon Administration. Subject to certain time limitations, Nixon was also given the right to destroy all of his presidential materials.

Thus, not only was Nixon claiming title to original documents with an estimated value of millions of dollars, he was asserting a right to deny access to information about his presidency. Not surprisingly, representatives of the news media, the academic world, law enforcement and members of Congress voiced strenuous objections to the Nixon-Sampson agreement on grounds both of property rights and access.

2. TERMS OF THE NIXON-SAMPSON AGREEMENT

1) **Ownership.** Nixon was recognized as the "owner and custodian" of the materials. He was given "all legal and equitable title" to the White House documents and tapes, including "all literary property rights."

2) **Custody.** The *materials* were to be *transferred* from the White House and deposited in a storage facility near San Clemente, owned by the government and maintained at public expense.

3) **Access.** The agreement recognized that Nixon had "sole right and power of access" to the materials. Entrance to the storage facility would require the use of two keys, one in the possession of Nixon and the other controlled by the Archivist of the U.S. All requests for access to the materials would be referred to Nixon. If a subpoena was issued to the government to produce any of the materials, Nixon would be immediately notified so he could raise "any privilege or defense" he might have.

4) **Preservation.** Under the agreement, all the Nixon tapes would be destroyed at the time of Nixon's death or on September 1, 1984, whichever occurred first. Nixon could also destroy any specific tapes after September 1, 1979. All documents other than tapes would be stored for three years, during which time Nixon could reproduce them but could not remove any originals. After three years, he could withdraw the original documents and dispose of them as he saw fit.

The agreement was supported by a legal memorandum from Attorney General William Saxbe which concluded that presidential papers are owned by the President involved. This conclusion was largely based on tradition—most Presidents from the time of George Washington, according to the memo, have regarded White House papers and historical materials "whether of a private or official nature" as their own property.

Other commentators pointed out that case law supports the general proposition that documents prepared by public officials conducting official business on government time and using government materials belong to the government, not to the individual government official. They also observed that past practice has not been uniform—that, in fact, other Presidents and public officials have allowed the government to assume control of their papers.

SPECIAL PROSECUTORS OBJECTIONS 3.

When then Special Prosecutor Leon Jaworski expressed concern that implementation of the agreement would hinder his access to materials needed in Watergate trials, President Ford agreed to keep the Nixon documents and tapes under White House control pending further discussions with the Special Prosecutor's Office.

CONGRESSIONAL ACTION 4.

Members of Congress also acted in opposition to the Nixon-Sampson agreement. On October 4, the Senate passed (by a 56 to 7 vote) a bill introduced by Sen. Gaylord Nelson (S. 4016) that provided for continued government control of the Nixon presidential materials. The bill also directed GSA to issue regulations allowing general access to the materials except for national security information or in cases where disclosure "is likely to impair an individual's right to a fair and impartial trial." Similar measures proposed in the House were not acted on before the election recess.

COURT ACTION: NIXON AND NEWS MEDIA LAW SUITS 5.

With the tapes still being held in the White House temporarily, attorneys for former President Nixon filed suit in federal court on October 17 seeking immediate implementation of the Nixon-Sampson agreement. The suit claimed that the delay in implementation interferred with Nixon's contractual rights and inhibited his ability "to protect the constitutionally based privilege of confidentiality in his presidential materials."

Four days later, *The Reporters Committee, the American Historical Association*, the *American Political*

Science Association and several individual reporters, historians and political scientists filed suit seeking to void the Nixon-Sampson agreement, contending that the presidential materials belonged to the Government and that the public, subject to certain safeguards, should have access to them. The suit said that the presidential documents "constitute valuable, irreplaceable information resources of profound importance to plaintiffs in the conduct of their professions," and that journalists and historians would be "irreparably injured" if ownership and custody of the materials were transferred to Richard Nixon.

Columnist Jack Anderson filed a separate action in opposition to implementation of the Nixon-Sampson agreement. The Special Prosecutor's office also opposed the Nixon suit.

6. THE TEMPORARY RESTRAINING ORDER

On October 22, U.S. District Judge Charles R. Richey issued a temporary restraining order barring the Ford Administration "from effectuating the terms and conditions" of the Nixon-Sampson agreement. He ordered that all the materials be kept at the White House pending resolution of the ownership question. Nixon and former White House employees who are defendants in the Watergate trial were given access to the materials but only for the purpose of preparing testimony.

Judge Richey also said he would allow access in response to subpoenas or a request from the Special Prosecutor and "for purposes of current government business." He insisted that during any search of the materials a representative of the Ford White House and a Nixon representative both be present and that they "shall take such steps as are necessary to assure that the search for and copying of said materials will in no way destroy or affect the original character of any of the materials..."

Several days following Judge Richey's ruling, the American Civil Liberties Union filed a suit on behalf of the Committee for Public Justice, an organization composed of authors, lawyers and historians, claiming a right to access under the Freedom of Information Act to all presidential tape recordings subpoenaed by the House Judiciary Committee in its impeachment investigation.

7. PRESIDENT FORD & THE PRESS: AN ASSESSMENT OF THE PRESS OFFICE BY A WASHINGTON CORRESPONDENT

"...I hope the White House Press Corps is ready for another Ron. I'm a Ron, but not a Ziegler, I can tell you that..."

—White House Press Secretary Ron Nessen at his first briefing for reporters, September 20, 1974.

Relations between the Washington press corps and the White House, which deteriorated badly in the post-Watergate period of the Nixon Administration, have improved somewhat under the new President. For one thing, the President himself—the best news source, in most cases—is more available and open to reporters.

In the view of many White House correspondents, however, the level of White House candor is still not what it should be, and the availability of full and accurate information is still a problem to be dealt with by the working press. In some ways, the role of the reporter is harder in the Ford Administration because of the inexperience and (hopefully temporary) ineptness of the White House Press Secretary and his staff.

Press Secretary Ron Nessen, a former *NBC News* correspondent who was drafted from the press room by President Ford after his first Press Secretary, Jerald terHorst, resigned in a dispute over his own lack of access to information (see this *PCN*, p. 15), meets with the President for a half hour every morning before facing reporters at the daily White House press briefing. Nessen's style is to try to get Ford's thinking on current issues by discusssing them directly with Ford and his senior advisors.

Leaving the administrative details of running the Press Secretary's office to his subordinates, Nessen monitors as many private White House meetings as he can, and later provides reporters with summary "fills" of the discussions.

Briefing Book

Unlike former President Nixon's press secretary, Ronald Ziegler, who memorized or "winged" his answers to reporters' questions—acquiring in the process a reputation as a dissembler and artful dodger—Nessen has aimed for concise and accurate responses, even to the point of preparing a daily briefing book with the answers to all the likely questions written out and filed by subject.

Nessen's technique is to distill every question down to its general subject area, look up the subject in his notebook and read back the answer. This leads to some confusion when Nessen's prepared answer fails to fit the question. He has been known to chide reporters for not asking questions, the answers to which he has in his notebook. But when a question is asked for which he has no written answer, he frequently is stumped for a response. And there are times, just as in the Nixon White House, when the Press Secretary is under strict orders not to take questions dealing with particularly sensitive subjects.

This happened in November, for instance, when the White House and the Special Watergate Prosecutor reached a compromise agreement on access to the Nixon tapes. On many foreign policy questions, Nessen refers the reporter to the State Department, which refers him

back to the White House, and so on. One correspondent told Nessen he was engaging in a "ping pong strategy," designed to wear down the press.

In the Ford White House, routine press queries are handled promptly by an increasingly efficient staff of deputy and assistant press secretaries, who can also help reporters reach senior staff aides. One thing never changes, regardless of who is President: White House aides don't like to return reporters' phone calls, and will avoid doing so whenever possible.

8. GERALD TERHORST RESIGNS AS PRESS SECRETARY, CITING INCORRECT INFORMATION

On September 8, presidential press secretary Jerald terHorst resigned his post because of President Ford's pardon of Richard Nixon and because he felt he was being kept in the dark about important White House decisions.

TerHorst said he had not been told about the Nixon pardon until the day before it was announced.

He also said that he had been misled by high administration officials on a number of different matters, and that this caused him to issue misleading statements to the news media.

Besides the pardon, terHorst had been told by White House officials that Alexander Haig would remain in the Ford White House. Two days later it was announced that Haig would probably become Supreme Commander of NATO.

Also, terHorst relayed to the press an assurance from the administration that a recent White House visit by Republican National Chairman George Bush was merely routine. The next day Bush was named U.S. envoy to China.

Before coming to the White House, terHorst was Washington bureau chief for the Detroit *News*. He recently returned to the *News* as a Washington columnist.

9. NETWORKS AGREE TO COVER FORD SPEECH LIVE AFTER PROTESTS BY WHITE HOUSE

On October 15, President Ford was scheduled to make a major economic address before the Future Farmers of America in Kansas City.

Prior to the speech, the three networks had decided not to give it live coverage.

This decision, however, did not sit well with the White House. Shortly before noon on the day of the speech, a White House official telephoned Frank Jordan, chief of the *NBC* Washington Bureau and head of the network news pool committee, with a formal request for live network news coverage.

The networks agreed to the presidential request and gave the speech live coverage.

White House press secretary Ron Nessen said the request was not tantamount to an order. He described the speech as "a special speech...directed at the people."

NETWORKS AGREE TO COVER FORD SPEECH LIVE AFTER PROTESTS BY WHITE HOUSE 10.

Shortly after Gerald Ford became President, *NBC*, *ABC*, and *CBS* each asked for an exclusive presidential interview.

The first White House response came in mid-October, when Press Secretary Ron Nessen offered to arrange an interview between Ford and *CBS* correspondent Walter Cronkite. As Nessen asked that the interview be aired shortly before the November 5 elections, *CBS* declined the offer, citing its potential to influence the outcome of close congressional races. The network asked Nessen to reschedule the interview.

Nessen did not respond to the request. Instead, there was an unattributed statement—*CBS* says it came from the White House—saying that the network had rejected the offer because of its bitterness over the Future Farmers of America incident (see above).

Nessen then offered the interview to *ABC*. Although *ABC News* president William Sheehan agreed with *CBS*' decision to postpone, he said that *ABC*'s plan was to film a non-political "travelogue" at Camp David, and the network made a tentative decision to accept Nessen's offer.

With the interview scheduled for two days before the elections, *ABC* sent camera crews to Camp David on October 26. Shortly thereafter, however, the network reversed its decision and postponed the interview.

Federal Legislative

CONGRESS OVERRIDES FORD VETO OF FREEDOM OF INFORMATION ACT 11.

The House of Representatives approved in March a series of amendments (H.R. 12471) designed to make the 1966 Freedom of Information Act more useful and accessible to the press and public (see *PCN IV* p. 35). On May 30, the Senate approved its version of the bill (S. 2543) introduced by Sen. Edward Kennedy (D-Mass.). For a comparison of both bills, see *PCN V*, p. 55-56.

CONGRESSIONAL CONFERENCE REPORT 12.

The Conference Committee chaired by Kennedy and Rep. William S. Moorhead (D-Pa.) met in late August to work out a compromise bill between the two houses. Reacting to a veto threat from President Ford, the conferees modified the bill to meet objections he raised in an August 20 letter to Kennedy.

Freedom of Information/Federal Legislative

Rep. John E. Moss (D-Ca.), chairman of the House Subcommittee on Information and author of the 1966 FOI Act, apparently felt the conferees went too far in meeting Ford's objections. He walked out of the Conference meeting saying, "I can't sign this."

The Conference Committee nevertheless voted 4-3 to approve the report. In early October, the Senate approved the conference report by voice vote with only Sen. Roman Hruska (R-Neb.) dissenting. On October 7, the House of Representatives voted nearly unanimously (349-2) also to accept the report and to send it to President Ford to be signed into law.

As passed by the Congress, the bill provided for:

- Discretionary authority in the Civil Service Commission to impose up to 60 days suspension without pay for federal employees who withhold information "without a reasonable basis in law" after a written finding by the court of circumstances surrounding the withholding suggesting arbitrary and capricous action by the official;
- *In camera* court review of documents withheld from the public by agencies under any of the nine exemptions specified in the original 1966 FOI Act;
- Access to police investigatory files only to the extent that their release would not "interfere with enforcement proceedings, deprive a person of a right to a fair trial or an impartial adjudication, constitute a clearly unwarranted invasion of privacy, disclose the identity of a confidential police source, or disclose investigative techniques and procedures;"
- Attorney's fees and court costs to be awarded to successful plaintiffs only upon a showing of a "general public benefit;"
- The promulgation of regulations within government agencies establishing uniform fee schedules and recovery of the direct costs of search and duplication;
- A 30-day period for defendants to respond to complaints filed in court alleging violations of the Act;
- An expedited appeals process for all FOI cases;
- A 10-day administrative time limit within which agencies must respond to information requests and a 20-day time limit within which the agency head must hear an appeal before the aggrieved information seeker can go to court to contest the agency's information refusal;
- A time extension beyond the 10-day response period when the agency can show "exceptional circumstances" warranting a time extension;
- Withholding of information where specifically authorized by statute in the interest of "national defense or foreign policy." In addition, courts hearing challenges to the inclusion of documents in this category and viewing them *in camera* were specifically instructed to give added weight to an intelligence agency's determination that the material pertained to national defense;
- The release of information "reasonably segregable" from other records exempted from disclosure;
- An expanded application of the Act to reach the Executive Office of the President but not including the President's immediate personal staff or other Presidential advisory positions;
- An index of material available to the public to be compiled and published quarterly.

FORD VETO 13.

On October 17, Ford vetoed the bill. He said that although the conferees had amended several objectional provisions of the proposed bill, they had not gone far enough to resolve several "significant problems."

Ford expressed disapproval of the provision allowing federal court judges to substitute their judgment for that of intelligence agencies and release information after an *in camera* review of the documents if they disagreed with the agency determination that disclosure would endanger the national security. Instead, Ford suggested a provision requiring federal judges to "automatically" uphold a security classification if any "reasonable basis" to support it could be found. He termed the conference provision a threat to "military or intelligence secrets and diplomatic relations."

Ford also singled out the ten-day administrative time limit given agencies to determine whether or not to furnish requested documents and the twenty-day appeal provision as "simply unrealistic in some cases."

In addition, Ford took issue with the investigatory files disclosure provision. He commented that "millions of pages of FBI and other investigatory law enforcement files would be subject to compulsory disclosure." Ford said law enforcement agencies do not have the personnel necessary to monitor information requests and give out those documents authorized for release.

FORD OFFERS SUBSTITUTE BILL 14.

While intensive lobbying efforts to override the veto took form on Capitol Hill, the White House prepared a substitute Information Bill it would accept. Those suggestions, sent to Congress one week after the veto, provided for:

- Citizens to pay all costs over $100 incurred by an agency while reviewing documents for release, whether any documents were found or not;
- Agencies to be allowed either 65 working days or 3 months to respond to information requests;
- Investigatory files to be entirely exempt from disclosure;
- Agencies to seek "unlimited" time extensions from the U.S. District Court when responding to information requests;
- Federal judges to release classified documents only after a finding that there was no reasonable basis to uphold the agency's security classification.

15. **NNA SPEARHEADS OVERRIDE EFFORT**

Members of the National Newspaper Association (NNA), one of the groups working most actively to override the veto, met with administration officials in mid-November and learned that the White House was willing to negotiate several of the substantive provisions of the Information Act. According to Terry Maguire at NNA, White House officials were adamant, however, with regard to the *in camera* review standards and the costs to be passed on to information seekers.

Other newspaper and public interest groups working to override the veto include the American Society of Newspaper Editors, the Radio Television News Directors Association, Sigma Delta Chi, Common Cause, Congress Watch, Consumer Federation of America, the U.A.W. and the A.C.L.U.

In a surprise move November 14, the American Newspaper Publishers Assocition came out in support of the Ford compromise proposal saying it represented the best chance for early enactment of an information bill. The Association said if the Ford bill were enacted and experience with it proved unsatisfactory, it would urge further amendment.

The House and Senate voted in late November to override the Ford veto. The House vote came Nov. 20 and passed by a 371-31 margin—over 100 votes more than the required two-thirds needed to override a Presidential veto. The following day, the Senate voted 65-27 also to override the veto.

The bill becomes effective Feb. 19, 1975.

NATIONAL SECURITY

16. **HOUSE BILL WOULD LIMIT NATIONAL SECURITY CLASSIFICATIONS**

In December 1973, Rep. William Moorhead (D-Pa.) introduced a bill (H.R. 12004) to add a new section to the Freedom of Information Act establishing a uniform system of "national security" information classification. The bill was referred to the House Foreign Operations and Government Information Subcommittee of the Government Operations Committee where hearings were held during the summer.

Currently, departmental agencies may classify national defense information according to their own regulations and legally withhold classified information from the public under exemption (1) of the Freedom of Information Act.

The proposed legislation, titled the "Freedom of Information Act Security Classification Amendments of 1973," would allow information to be designated as "Top Secret," "Secret" or "Confidential."

"Top Secret" information, under the bill, is defined as material which could cause "exceptionally grave damage" to the national security. "Secret" information would be that material capable of causing "serious damage" to the national defense if released to the public and "Confidential" information that which would cause "damage" to the national defense.

In addition, the bill stipulates that information may not be classified in order to "conceal incompetence, inefficiency, wrongdoing, administrative error or to avoid embarrassment to any individual or agency."

In July, Justice Department officials testified that a provision in the bill establishing a nine member Classification Review Commission—six of whom would be chosen by the President from persons recommended by Congress—was unconstitutional because it encroached on the Executive's authority to ultimately determine national security classifications.

Subcommittee members are currently redrafting the proposal and hope to hold further hearings later this year.

17. **PROPOSED OFFICIAL SECRETS ACT STALLED IN SENATE**

Two bills which reform the Federal Criminal Code—S. 1400, introduced by Sen. Roman Hruska (R-Neb.) and sponsored by the Administration, and S. 1, introduced by Sen. John McClellan (D-Ark.)—have been combined into one legislative package by the Senate Subcommittee on Criminal Laws and Procedures.

The combined form of the bills is still before the subcommitte and, because of its length and complexity, will probably not be acted upon this session. However, according to the subcommittee, McClellan plans to re-introduce the package early next year.

Media groups, including *The Reporters Committee*, opposed both S. 1400 and S. 1, arguing that the bills threaten the press' newsgathering capabilities by making it a crime to publish certain broad categories of government information, including almost all information relating to the "national security" along the lines of the British Official Secrets Act (see *PCN IV*, p. 35 and *PCN II*, pp. 1-3).

18. **CIA PRESS INJUNCTION BILL STALLED** (See this *PCN*, p. 12)

19. **NATIONAL SECURITY LEAKS BILL PENDING** (See this *PCN*, p. 11)

20. **CONGRESSMAN FACES POSSIBLE CENSURE BECAUSE OF NEWSPAPER ARTICLE** (See this *PCN*, p. 36)

21. **CONGRESS MOVES TO OPEN MORE OF ITS SESSIONS & AGENCY MEETINGS**

The House and Senate are both considering bills which would open Congressional committee and federal regulatory agency hearings to the public (see *PCN V*, pp. 63-64).

Both bills call for public announcement of the date, place and subject of the meeting one week in advance, and provide that complete transcripts of all meetings be furnished. The bills contain exceptions allowing closure of meetings for national security matters, for "personal matters" and for matters involving "excessive invasions" of individual privacy.

Consideration is not expected during the current session on the House bill (H.R. 1000), but hearings on the Senate bill (S. 260) were held before the election recess.

During those hearings, representatives of the Securities Exchange Commission, the Civil Aeronautics Board and the Interstate Commerce Commission testified against the bill. They expressed fear of the chilling effect that open meetings would have on agency deliberations.

22. SENATE BILL TO STOP NEWS MEDIA EXCLUSION FROM U.S. BASES ABROAD

Sen. Mike Mansfield (D-Mont.) has authored an amendment to the Senate Foreign Assistance Act of 1961 prohibiting the President from authorizing funds to be spent for foreign assistance if American newsmen are excluded from foreign military bases constructed with U.S. funds or staffed by American military personnel. The amendment was sparked by the exclusion of reporters from military bases during the Vietnam war (see *PCN II*, p. 11).

The provision, contained in section 17 of the Foreign Assistance Act of 1974 (S. 3394) introduced in the Senate September 3 by Sen. John Sparkman (D-Ala.) would add a new section to the 1961 Act and replace a similar provision currently in effect under section 29 of the 1973 Foreign Assistance Act.

The Sparkman bill was recommitted to the Senate Foreign Relations Committee October 2. It is expected to be reported out of Committee again later this year.

PRIVACY/SECRECY

23. **CONGRESS FAVORS OMNIBUS PRIVACY**
24. **SECRECY BILLS GIVING INFORMATION TO**
25. **POLICE BUT NOT MEDIA: HR 1673, S 3418**
26. **SENATE CRIMINAL JUSTICE BILL (S 2963)**
27. **JUVENILE JUSTICE BILL (S 821)**(See this *PCN*, p. 51)

TELEVISING CONGRESS

28. JOINT CONGRESSIONAL COMMITTEE URGES TELEVISED SESSIONS

Live television coverage of the House Judiciary Committee debate on impeachment was the first time that cameras were allows to broadcast a House committee's deliberations, and public acceptance of the experiment had apparently persuaded the House to permit coverage of the floor debate on impeachment (see *PCN V*, p. 83).

The Joint Committee on Congressional Operations recommended in mid-October that Congress install permanent television broadcasting facilities on the floor of both houses next session and allow commercial and public networks to cover its activities on a continuing basis. While the committee urged that camera locations should be fixed and unobtrusive and that filming of reactions to an on-going presentation discouraged, the report emphasized that "no control over the selection of materials for broadcast use" should be exercised by Congress.

In the report's only dissent, Sen. Jesse Helms (R-N.C.) said the result would be that Congressmen would perform for their constituents with oratory rather than persuade other members with debate.

Sen. Lee Metcalf (D-Mont.), chairman of the comittee, plans to introduce a resolution encompassing the report's recommendations when Congress reconvenes in November.

29. 20th CENTURY FUND TASK FORCE RECOMMENDS TELEVISING CONGRESS

The recommendation of the Joint Committee on Congressional Operations to televise Congressional floor debate was echoed by a Twentieth Century Fund Task Force in a report issued in late October. The Task Force proposed that Congress authorize the Corporation for Public Broadcasting to arrange the physical facilities and to make broadcast coverage available to all networks. If Congress itself provided the coverage, said the Task Force's report "Openly Arrived At," the public might suspect that "only what the legislature believed to be the best aspects of the institution were being shown."

30. AMERICAN BAR ASSOCIATION URGES LIMITATION ON COMMITTEE BROADCASTS

In August, the 1974 Annual Meeting of the American Bar Association reaffirmed a 20-year-old resolution urging Congress to provide "that no witness shall be compelled to give testimony in any [committee] hearing for broadcast by radio or television" unless the witness gives his written consent. The ABA pointed out that Congressional investigations often deal with subjects of civil or criminal proceedings, and that the effect of broadcasted hearings may jeopardize a witness' constitutional rights to a fair trial.

31. TELEVISED IMPEACHMENT IS 'PUBLIC'S BUSINESS': NEW YORK BAR ASSOCIATION

Prior to former President Nixon's resignation, the Special Committee on Communications Law of the New York City Bar Association advocated the televising of the House and Senate impeachment proceedings. If the debate were broadcast, the report said, the public would be able to satisfy itself that the proceedings were conducted fairly and that Congress was performing its duties seriously and intelligently, and, as a result, public confidence in Congress would be strengthened. "Most profoundly, impeachment and removal is the public's business and hence the public ought to be as well informed as possible."

Freedom of Information

Federal Executive

32. SENATE PANEL TO INVESTIGATE INFORMATION POLICIES OF REGULATORY AGENCIES; FTC POLICY CRITICIZED

Pursuant to Senate Resolution 253, the Senate Subcommittee on Consumers, chaired by Sen. Frank Moss (D-Utah), is presently conducting a study of information policies of the seven independent federal regulatory agencies, including the Federal Trade Commission, Federal Communications Commission, Federal Power Commission, Federal Maritime Commission, Interstate Commerce Commission, Civil Aeronautics Board, and Consumer Products Safety Commission.

In a September 3 memo to the Subcommittee, Stanley Cohen of *Advertising Age* and John Jenkins of the *Bureau of National Affairs*, journalists who regularly cover Federal Trade Commission news, recommended that the FTC: (1) rule upon requests for access under the Freedom of Information Act within ten days; (2) specify what requests for documents have been granted and place those documents in a "public reference file" within thirty days; and (3) publish a public calendar which lists all meetings between FTC staff and representatives of "outside interests," and open those meetings to the public.

33. FTC TO GIVE MORE DISCLOSURE OF COMMISSION VOTES

Many federal regulatory agencies disclose as a matter of policy not only the votes on final decisions, but votes on intermediate actions as well. Until recently, however, the Federal Trade Commission would reveal only the agency's final votes, even though many cases are not resolved until several years after an investigation has begun and intermediate votes have been taken.

Responding to criticism by journalists that its decisions have been made more secretively than those of other agencies, the FTC announced in September that it would disclose the intermediate votes of individual commissioners on a "broader" range of actions such as the rejection of a report of compliance and the provisional acceptance of a consent order.

34. ADVERTISING AGE MAY SUE FTC OVER CLOSED MEETINGS WITH CONSUMER GROUPS

On July 26, John Revett, a reporter for *Advertising Age*, was denied access to a closed meeting between the Federal Trade Commission and consumer group representatives (see *PCN V*, p.63).

Advertising Age Washington Editor Stanley Cohen protested to FTC chairman Lewis Engman. Cohen and John Jenkins, correspondent for the Bureau of National Affairs, met several times with FTC commissioners and attorneys. As a result of the consultations, the commissioners are considering proposals for reform of the agency's information policies.

Cohen anticipates that the FTC will open more of its meetings to the public and that it will acknowledge that the decision to bar Revett was unwarranted. If no such announcement is made, *Advertising Age* will consider taking legal action against the agency.

35. FTC EXCLUDES SOME MEDIA FROM BRIEFINGS

The chairman of the Federal Trade Commission, Lewis Engman, recently began regular press briefings on Wednesday mornings and closed them except to selected invitees, which include reporters for the *Associated Press*, *United Press International*, *Washington Post*, *Washington Star-News*, *New York Times*, *Time*, *Newsweek*, *Advertising Age*, and the Bureau of National Affairs *Antitrust and Trade Regulation Report*. Publications whose requests to attend have been rebuked include *Food Chemical News*, *Broadcasting Magazine*, *Of Consuming Interest* and *Business Week*.

An FTC spokesman said that Engman invited the correspondents on a selective basis so that he "won't have to worry about the prejudgmental problems by some reporters that are part of full and formal press conferences." The spokesman added that Engman chose those "who were the most knowledgeable about the FTC and who would ask the toughest questions."

On October 22, Sen. Warren Magnuson (D-Wash.) asked Engman to open the meetings to all members of the press. Noting that some publications which are excluded are in direct competition with publications which are allowed to attend, Magnuson said that "it would be a shame" if the FTC, which regulates competition among industries, "conferred a monopoly on Commission news to the selected publications." Engman has not responded to the letter.

36. MOST FAVORED MEDIA PROBLEMS

The Engman practice of regularly giving certain publications special benefits and granting them access to information which is withheld from others, is traditional in Washington. The "most favored media" organs have routinely accepted their preferential access without objection. Government agencies have therefore operated mainly on the same assumption.

However, in the last two years, the increase in alternative special publications—on civil rights, the environment, consumers, the aged, women, etc.—has put a great deal of stress on the most favored media concept, both ethically and legally.

Reporters for the establishment media compete for selected news breaks but are ethically uncomfortable with an institutionalized system of regular discrimination against the less favored media.

The less favored media reporters are now pressing government agencies for equal treatment, at least in formal press contacts, as illustrated by the FTC incident described above.

Some other aspects of the problem are:

• *White House*—In order to cover briefings and press conferences at the White House, a reporter must obtain a "press pass," of which there are about 1500. In response to a suit filed by Thomas Forcade of the Alternative Press Syndicate and Robert Sherrill of *The Nation*, who were denied accreditation, the Secret Service argued that it has full discretion to control access to White House grounds (see *PCN V*, p. 56).

• *Congress*—In order to cover Congress, a newspaper reporter must be a member of the Standing Committee of Correspondents of the House and Senate Press Galleries and must follow its rules. When Richard Strout of *The Christian Science Monitor* refused to agree to one of those rules (not to accept money from *Voice of America*) his membership was terminated (see *PCN V*, p. 64).

• *Private Media Groups*—Nor is the practice limited to government. Godfrey Sperling of *The Christian Science Monitor* breakfast club—one of several in Washington—has held over 500 meetings for newsmen and has featured such public figures as Sen. Henry Jackson, Henry Kissinger, Arthur Burns, George Bush, Eliot Richardson and Pat Buchanan. The club has a core of about 35 of the "most favored media. "It excludes the *Associated Press, United Press International, Reuters* and the three broadcast networks on the grounds that the instant nationwide coverage of the wires and networks would scoop the other reporters.

While Sperling said he never turns down a request from a reporter to attend, members of the club say that only a limited number of selected publications are notified when a breakfast is arranged. The group is conscious of the restrictions this represents and has sought to address them. At the same time, the group implicitly understands that the number of reporters and the type of publications which are invited according to Sperling, "are subject to the prevailing mores in this town."

37. RECORDS OF FED. ENERGY AGENCY MEETINGS TO BE MADE PUBLIC (See this *PCN*, p. 36)

38. HEW ADOPTS EXPEDITED FOI POLICY

In August, the Department of Health, Education and Welfare issued new departmental freedom of information regulations which allow more public access to information and which expedite the handling of requests for information. It was the first revision of the regulations since they were instituted in 1967.

The new regulations require that an initial request for information be responded to within 10 working days and that an appeal from a denial of access be acted on within 20 working days from when the request for review was filed. These provisions are identical to those contained in the amendments to the Freedom of Information Act that President Ford recently vetoed (see this *PCN*, p. 15).

The new regulations specify particular types of records which will be made available to the public. These include official correspondences between HEW officials and non-agency individuals or groups and records relating to research and development projects.

Records specifically made unavailable under the new regulations include intra- and inter-agency memos reflecting the views of the writer or other people, and all investigatory files compiled for law enforcement cases that are still open. If a case is closed, the investigatory files will remain unavailable if they reveal the names of informants, release trade secrets or reveal policy recommendations.

TVA CHARGING MEDIA FOR SUPPLYING AGENCY INFORMATION ON COAL RESERVES 39.

The Tennessee Valley Authority (TVA) is a congressionally chartered public corporation subject to the federal Freedom of Information Act. In August, a reporter for the *Whitesburg* (Ky.) *Mountain Eagle* asked TVA for documents relating to coal reserves TVA expected to purchase. TVA billed the paper for $108.

A spokesman for TVA explained the billing to the *Eagle* noting that it took a file clerk 16 hours at an hourly rate of $6.75 to locate the requested information. The spokesman also told an *Eagle* reporter that this was the first time a newspaper has been charged for such information.

NOTE: The Freedom of Information Act does not make provision for search fees for information although reasonable copying charges may be assessed.

COURT OPENS SECRET ADVISORY BOARD MEETINGS 40.

The Federal Advisory Committee Act, 5 U.S.C. App. I § 1 *et seq.*, requires that there be full public access to all advisory committee meetings, that there be sufficient public notice of such meetings and that full records of the meetings be kept. Exemption 5 of the Freedom of Information Act, 5 U.S.C. 522, exempts intra-office documents from the general disclosure provisions of that Act.

In August, the Commerce Department held two closed sessions of its Travel Advisory Board, a committee made up of non-government employees. The Department claimed that since intra-office documents were discussed

at the meetings. Exemption 5 allowed it to hold secret sessions.

Later in August, the Aviation Consumer Action Project filed suit against the Commerce Department because of the secret sessions.

On September 6, U.S. District Court Judge William Bryant ruled that the Department had violated both the Freedom of Information Act and the Federal Advisory Committee Act in holding the secret sessions. The Court held that Exemption 5 cannot be invoked as to "documents which have been...disclosed by the agency to members of an advisory committee who are not full-time employees...of the Federal Government." The Court enjoined the Department from excluding the public from advisory committees.

41. AMERICAN LIBRARIES ASSOCIATION WRITER FIRED FOR SEEKING FOI INFORMATION

(See this *PCN*, p. 70)

42. US COURT SAYS OFFICIAL NAVY AUDITS STAY SECRET UNDER FOI ACT

In 1973, the Department of the Navy compiled two reports concerning alleged over-expenditures from 1969 to 1972. One report was prepared by the Inspector General of the Navy, and it contained recommendations of disciplinary action because of the over-expenditures. The other report was an audit prepared by the Auditor General.

As part of an investigation into Naval over-expenditures, reporters Mark McIntyre and Brit Hume (both former Jack Anderson associates) requested copies of the Navy reports on February 12, 1973.

On March 16, 1973, the Navy denied the request, and on June 21, 1973, the reporters filed a Freedom of Information Act suit in federal court to require disclosure of the reports. The suit was handled by the FOI Clearinghouse.

On October 3, 1974, District Court Judge Thomas Flannery held that the Freedom of Information Act does not require the Navy to produce the reports. Flannery said that the Inspector General's report was within Exemption 7 of the Act ("investigatory files compiled for law enforcement purposes") because it recommends disciplinary action. He also said that the Auditor General's report was within Exemption 5 ("inter-agency or intra-agency memorandums") since it reflects the opinions of the auditor concerning internal Navy operations.

An appeal is uncertain.

REPORTER SUES AMTRAK FOR DATA 43.

In March 1973, Amtrak's board of directors refused to supply minutes of its meeting to *Washington Star-News* reporter Stephen M. Aug (see *PCN V* p. 62). Amtrak, a congressionally-charted corporation, is subject to the Freedom of Information Act.

In July 1974, Aug filed a suit in federal court claiming that he was entitled to the documents under the Act.

In its answer, Amtrak claimed that it was entitled to withhold the minutes under Exemption 5 of the Act, allowing non-disclosure of intra-agency memorandums.

It also stated that Aug's request was overly broad and did not present a request for identifiable records as required by the Act.

PENTAGON RELEASES MY-LAI MASSACRE STUDY SHOWING COVER-UP 44.

In 1969, the Secretary of the Army ordered a detailed investigation into the adequacy of the preliminary Army reports on the My Lai massacre.

The result of this investigation was the four volume Peer Commission Report, which was submitted to the Pentagon in March 1970.

In 1972, Congressman Les Aspin (D-Wisc.) requested that the Defense Department make the Report public. Aspin filed a Freedom of Information Act suit in federal court when the Defense Department refused his request.

In 1972, District Court Judge John Pratt dismissed Aspin's suit, holding that Exemption 7 of the Freedom of Information Act ("investigatory files compiled for law enforcement purposes") allowed the Defense Department to keep the Report secret.

This decision was affirmed by the United States Circuit Court of Appeals in 1973.

On November 13, 1974, the Defense Department finally opened two volumes of the Report to the public. A Pentagon spokesman said the two volumes still being withheld contained raw investigatory material that might harm individuals mentioned in them.

One of the volumes that was released contains the analyses and conclusions of the Peer Commission; the other contains documentary evidence. The report revealed that there had been a massive attempt by the Army to cover up the massacre.

NETWORKS USE FOI FOR NIXON PAPERS 45.

(See this *PCN*, p. 66)

46. SUPREME COURT FREEDOM OF INFORMATION CASES

NOTE: The following four Freedom of Information Act (FOIA) cases recently came before the Supreme Court. Although they were brought by non-media litigants, they are included in this *Newsletter* because there is no distinction under the FOIA between requests for disclosure made by consumer organizations, for example, or by the news media. The FOIA requires federal agencies to disclose documents at the request of "any person," regardless of that person's purpose in seeking the information.

The four cases discussed below involve the scope of two of the nine exemptions to the FOIA disclosure requirement.

Left standing because of the Supreme Court's decision against review were two appellate court precedents broadly interpreting Exemption 7 of the Act ("investigatory files compiled for law enforcement purposes") in favor of the government.

Both cases which the Supreme Court agreed to review deal with the scope of Exemption 5 ("inter-agency or intra-agency" memoranda) and were decided against the government by the U.S. Court of Appeals.

47. US SUPREME COURT TO REVIEW APPEALS COURT FOIA RULING MAKING PUBLIC NLRB MEMOS

Sears, Roebuck & Co., involved in a dispute with a union local, complained in April 1971 to the National Labor Relations Board (NLRB). After the NLRB refused to issue an unfair labor practice complaint against the union, Sears unsuccessfully sought to obtain from the board copies of NLRB "advice memoranda" issued in its own case and similar cases. "Advice memoranda" are sent by the NLRB's Washington office to Regional Directors, instructing them on the handling of labor

Sears then filed suit under the Freedom of Information Act (FOIA), arguing the memoranda should be disclosed because they set out what amounts to rules of labor law to be applied in a particular case and future cases. The government relied on Exemption 5 ("inter-agency and intra-agency memorandums") in resisting disclosure.

The court ordered the NLRB to hand over the documents, finding that the memoranda should be disclosed because they contained not mere opinions of agency officials, but rather "instructions mandatory in substance if not in form." The court also quoted a provision of the FOIA which authorizes disclosure of "instructions to staff that affect a member of the public."

The decision was recently affirmed by the U.S. Court of Appeals for the District of Columbia Circuit on the basis of its own decision in the *Grumman* case (see this *PCN*, p. 23).

The NLRB appealed to the Supreme Court, which agreed on October 15 to review the case. The court also agreed to review *Grumman*. The two cases raise similar important issues regarding the scope of public access to internal government memoranda which form the basis for an agency's actions and decisions.

48. US APPEALS COURT RULES THAT FOIA DOES NOT COVER AUTO SAFETY AGENCY PROBES; US SUPREME COURT DECLINES REVIEW

Ralph Nader and Clarence Ditlow, an environmental attorney with Nader's Public Interest Research Group, filed suit under the Freedom of Information Act (FOIA) after they were refused access to correspondence between the National Highway Traffic Safety Administration (NHTSA) and automobile manufacturers about pending investigations of safety defects in new automobiles.

Although such orrespondence is routinely made public at the close of the NHTSA's preliminary inquiry, Nader and Ditlow argued that earlier disclosure was necessary to allow the public to comment or submit evidence at the critical early stages of an auto safety investigation.

The government argued that the correspondence being sought was exempt from disclosure under Exemption 7 of the FOIA ("investigatory files compiled for law enforcement purposes"). Nader and Ditlow answered that an investigatory exemption only applies if there is an enforcement proceeding, and no such proceeding had been initiated in this case.

A federal district court ordered disclosure, on the ground that although the files sought could conceivably lead to an enforcement proceeding, their disclosure would not cause serious harm to any law enforcement aim.

The U.S. Court of Appeals for the District of Columbia reversed, holding that it was error to have required a showing of harm. The court said that, as enacted by Congress, Exemption 7 applied wherever agency documents have a law enforcement purpose, and to add any further requirements would be to "second-guess the Congress."

Nader and Ditlow appealed to the Supreme Court, seeking reversal of the Court of Appeals opinion because it appeared to authorize blanket agency claims that any investigative or research related information can be kept secret under Exemption 7.

In October, the Supreme Court let the Court of Appeals opinion stand.

49. SUPREME COURT LETS STAND RULING THAT NLRB FILES ARE SECRET UNDER FOI ACT

A South Carolina textile manufacturer was refused access by the National Labor Relations Board (NLRB) to union affidavits and other documents collected by the

Board in the course of an investigation into irregularities in two union representation elections conducted in 1972 at the company.

In January 1973, the company filed suit under the Freedom of Information Act (FOIA). Denying that the documents being sought were subject to disclosure, the NLRB cited Exemption 7 of the FOIA ("investigatory files compiled for law enforcement purposes").

In January 1974, the U.S. Court of Appeals for the Fourth Circuit upheld the NLRB.The court gave a broad interpretation to Exemption 7, holding that, "Though practices vary, if aimed at enforcement of the NLRA, we think they are for 'law enforcement purposes.' "

The court also said that if a company is known to have access to union affidavits taken in the course of an NLRB investigation, union members may be reluctant to speak freely.

The company appealed to the Supreme Court, arguing that the information it needed to test the validity of a union representation election had been "cloaked in secrecy in contravention of a statute designed and intended to provide for freedom of information," and that the court's interpretation of Exemption 7 "would virtually render any administrative agency immune to do as it wished in secrecy."

In October, however, the Supreme Court denied review, with the effect that the Fourth Circuit opinion was left standing.

50. SUPREME COURT TO REVIEW APPEALS COURT RULING THAT RENEGOTIATION BOARD INFORMATION MUST BE MADE PUBLIC

In April 1968, the federal Renegotiation Board ordered Grumman Aircraft Engineering Corp., a government contracter, to repay the government $7.5 million in excessive profits for 1965. Grumman asked the board for access to documents explaining decisions made in 14 similar cases by its local units, the Regional Boards. The Board refused, citing Exemption 5 ("inter-agency and intra-agency memorandums") of the Freedom of Information Act (FOIA).

Grumman filed suit, arguing that because the Regional Boards have decision-making power, their determinations constitute "Final Opinions" subject to disclosure under the FOIA. The Renegotiation Board denied the documents requested were final opinions, and argued that disclosure would impair the decisional process of a government agency.

A federal court initially refused disclosure, but the U.S. Court of Appeals for the District of Columbia Circuit reversed and sent the case back for further proceedings. The District Court ordered disclosure, and in July 1973, the appeals court hearing the case a second time affirmed.

The court held that Exemption 5 applied to agency "documents composed exclusively for purposes of assisting policy formulation" but not to "those which serve to reflect policy already made and announced." Although conceding it may sometimes be difficult to draw this line, the court ruled that the documents sought by Grumman were clearly documents justifying final agency decisions, and hence subject to disclosure.

On October 15, the Supreme Court agreed to review the case, together with another case also involving the scope of the "inter-agency and intra-agency memoranda" exemption to the FOIA (See *Sears, Roebuck* case, this *PCN*, p. 22).

51

JUSTICE STEWART SAYS PRESS HAS NO CONSTITUTIONAL RIGHTS TO GOVERNMENT INFORMATION; PRAISES WATERGATE PROBE

On November 2, United States Supreme Court Justice Potter Stewart gave an address entitled "Or of the Press" at Yale University.

Stewart said that the press was performing its proper role as an active institution in relation to the Watergate scandals.

Stewart also said that while the "press may publish what it knows," even if it involves the publication of stolen government documents, "there is no constitutional right to have access to. . .government information."

JUSTICE DOUGLAS SUGGESTS GOVERNMENT SUBSIDIES FOR NEWSPAPERS 52.

On November 6, United States Supreme Court Justice William O. Douglas gave a speech at Fairleigh Dickinson University in Teaneck, New Jersey.

Douglas spoke about First Amendment powers that Congress has "to protect the press, [and] encourage publications."

Douglas advocated granting a postal rate subsidy to all environmental publications, "no matter the viewpoint being advanced," and to "country weeklies and small community newspapers."

FEDERAL INVESTIGATIONS TO TRACE NEWSLEAKS AT PENTAGON, STATE DEPARTMENT AND FBI 53.

(see this *PCN*, p. 37)

PUBLIC ACCESS RESTRICTIONS ON FEDERAL CRIME INFO

54. LEAA prior arrest records (See this *PCN*, p. 53)
55. FBI has new procedures (See this *PCN*, p. 52)
56. 13,000 May Day arrest records (See this *PCN*, p. 53)
57. Federal lawsuit to expunge old FBI info (See this *PCN*, p. 53)
58. U.S. Court opposes FDA media info (See this *PCN*, p. 45)

59. U.S. APPEALS COURT RULES INACCURATE FBI RECORDS MAY BE LIBELOUS & VIOLATE PRIVACY RIGHTS

The U.S. Court of Appeals for the District of Columbia Circuit recently decided an F.B.I. records case, the latest in a recent line of cases lending support to the idea that arrest and conviction records are matters of interest only to the particular law enforcement agencies and the particular individuals involved, and the related idea that a prior criminal record should be kept confidential even when it might be highly relevant and newsworthy in the judgment of a reporter.

On October 22, the court ruled by a vote of 2-to-1 that a lower court erred in refusing to hear a Texas man's suit for expungement of alleged inaccuracies from his F.B.I. file or an injunction prohibiting the F.B.I. from disseminating the uncorrected file.

Writing for the majority, Chief Judge David L. Bazelon ruled the F.B.I. has a "duty to take reasonable measures to safeguard the accuracy of information in its criminal files which is subject to dissemination."

Judge Bazelon found this duty implied in the federal statute authorizing the Attorney General to maintain criminal records (28 U.S.C. section 534) and in the rights of due process and privacy.

He also cited the common law of libel. The judge contended that if the F.B.I. has the right to disseminate inaccurate personal data without making any attempt to prevent inaccuracy, the agency would in effect have the right to libel the individuals concerned.

Judge Bazelon sent the case back to a lower court for a hearing to define exactly how the F.B.I. should go about safeguarding the accuracy of its files.

A dissenting judge accused the majority of ordering judicial oversight on the operations of the F.B.I., a function which he said belonged to Congress.

State

60. ALABAMA COURT OPENS SEALED ARREST FILES (See this *PCN*, p. 54)

61. WASH. D.C. COURT SAYS PRIVACY VIOLATED BY PUBLICATION OF RAPE VICTIM NAME (See this *PCN*, p. 53)

62. FLA. FOI LAW COVERS UNIVERSITY STUDIES

The Florida attorney general ruled that the state's public records law does not exempt a "work product" or "working paper" from its inspection provision.

Atty. Gen. Robert L. Shevin made the ruling in response to an inquiry by a state legislator who asked whether a University of South Florida official could refuse to allow inspection of a student government study made by students but in the school administrator's possession. The official had claimed inspection was not required by virtue of a work product or paper exemption.

But the attorney general cited a 1973 state court decision which rejected the exception and said "the only relevant concern in deciding whether a document is a 'public record' is whether" it is in the "legal possession of a public official." The state law provides for the inspection of public records.

63. FLORIDA COURT SAYS FOI LAW COVERS CITIZEN ADVISORY GROUP MEETINGS

The Palm Beach Town Council met in closed session to appoint a citizens' advisory zoning committee. The committee subsequently met with professional planning consultants in meetings which were closed to the public and at which no minutes were taken. The committee made zoning recommendations to the Town Council.

The town subsequently adopted a comprehensive zoning plan following public meetings before the council and the town zoning commission. The zoning plan was attacked in court by citizens who claimed that its adoption was invalid because of the non-public activities of the citizen's advisory group in violation of the state's "sunshine" law, which requires all state and local boards and commissions to meet in public.

A District Court of Appeals invalidated the zoning ordinance. Last May, the Supreme Court of Florida upheld the decision in an opinion which observed that

"the taxpayer deserves an opportunity to express his views and have them considered in the decision-making process." The news media, said the court, have made citizens aware of governmental problems by their constant reporting of community affairs.

NOTE: This holding appears to be a major extension of the Florida Sunshine Law preventing state agencies from avoiding coverage under the state Sunshine Law by delegating their function to private bodies.

64. **GEORGIA LAW BARS RAPE VICTIM NAME** (See this *PCN*, p. 53)

65. **IDAHO STATE AGENCY MUST OPEN INVESTMENT FUND INFORMATION TO PRESS**

The Idaho Endowment Fund Investment Board is a state agency which manages and invests state funds. The Board often invests in bonds or notes guaranteed by the federal government.

Early this year, the Boise *Idaho Statesman* began an investigation of the investment procedures followed by the Board. As part of this investigation, reporter Kenneth Matthews requested access to the Board's files concerning certain federally guaranteed Small Business Association loans.

Matthews made his request under the Idaho freedom of information law, which states that "the public records and other matters in the office of any officer are...open to the inspection of any citizens."

When the Board denied the request, the *Statesman* filed suit in Idaho state court.

In arguing against disclosure, the Board claimed that the data requested by Matthews were not public records because they were preliminary reports irrelevant to the Board's public function.

On September 16, Judge J. Ray Durtschi ordered the Board to open its records relating to Small Business Association loans made with state funds. The judge held that these documents were public records and were therefore within the scopeof the freedom of information law.

66. **INDIANA CORONER SEALS DEATH CERTIFICATES**

The Evansville-Vanderburgh County Health Department filed suit in August, 1973, against the *Evansville* (Ind.) *Press* seeking a declaratory judgment on the availability of death records to the public. The department had previously refused to allow *Evansville Press* reporter L.D. Seits to see the death certificates or purchase copies of them.

On July 22, 1974, a state Circuit Court Judge declared the records open to the public because of the Indiana State Anti-Secrecy Act. Under that act, all state government activities and documents are presumed to be public record information unless specifically closed by statute. The judge also said that the certificates were available based on a 1949 state statute expressly opening death records to the public.

The Department of Health has announced its intention to appeal the decision and has continued to deny the press access to the death certificates.

67. **MASS SEALS EX-OFFENDER CRIMINAL RECORDS** (See this *PCN*, p. 52)

68. **NY BILL TO PROTECT REPORTERS DIES IN COMMITTEE**

In early January, Assemblyman Joseph Margiotta (R-Uniondale) and Sen. John Dunne (R-Garden City) introduced bills in the New York State Legislature which would have provided for the prosecution of anyone who "intentionally or unreasonably obstructs or impairs the performance" of a news reporter or photographer (see *PCN IV*, p. 48).

Assembly Bill 8184 and Senate Bill 7016, which were assigned to the Codes Committees of the respective houses, died when the legislature adjourned, and it is not known if either will be re-introduced when the new session convenes in January.

69. **LONG ISLAND PAPER LOSES CITY BUSINESS AFTER CRITICIZING MAYOR**

For more than fifty years, the *Garden City* (N.Y.)*News* has been the official newspaper of that Long Island town and, as such, published all legal and public notice advertising. On July 17, the paper criticized the mayor for his handling of police contract negotiations and suggested that he resign. The next day, the village board voted to withdraw the official newspaper designation from the *News* and to award it to the *Garden City Leader*.

Criticizing the political pressure exerted by the village board, the Nassau County Press Association announced that it would investigate the incident. Before the investigation could get underway, however, Jeffrey King, owner of the *News*, sold the paper to the Litmor group based in Hicksville, N.Y. The new manager of the *News*, Robert Morgan, was also the chairman of the Nassau County Press Association.

The press group then suspended its plans for an investigation, because, according to Morgan, "we felt it might be considered to be a conflict of interest."

70. UTICA MAYOR LOSES PRESS HARASSMENT SUIT

The Gannett newspapers filed suit in federal court against Utica Mayor Edward Hanna and obtained a court order forbidding the mayor to discriminate against the reporters of two Utica newspapers (see *PCN V*, p. 67). A day later, Hanna issued a set of guidelines requiring reporters of all news media to write and sign all questions asked of city officials. The mayor also: (1) sued the *Observer-Dispatch* and *Daily Press* for $1 million in punitive damages for what Hanna termed press harrassment; and (2) requested that the Federal Court bar *Observer-Dispatch* reporter Denney Clements from City Hall. The newspapers refused to obey the guidelines and subsequently asked the court to find Hanna in contempt of the July 1 order.

In early August, the court struck down the mayor's guidelines and dismissed both the harassment suit and the request to deny Clements access to City Hall. However, the court declined to find Hanna in contempt.

71. OREGON POLICE HAVE DISCRETION TO OPEN OR CLOSE INVESTIGATION FILES

The Oregon open records act requires that the record of an arrest and the report of a crime shall be open to the public, but that criminal investigatory files shall not be disclosed "unless the public interest requires disclosure in the particular instance."

On September 4, Oregon Attorney General Lee Johnson issued an opinion that it was up to the police agencies to decide when the public interest required disclosure of investigatory files.

He also said that each request for disclosure of an investigatory file would be "judged on the individual facts, considering the nature of the crime, the interest of the public and the efficiency of the police agency and the interest of the inquirer."

Johnson stated that in a particular case, the "public interest" in freedom of the press might require the disclosure of an investigatory file to a member of the press, though not to a member of the general public.

72. ACLU CHALLENGES SECRET POLICE MEETING

Last April, a committee of the Portland, Oregon police bureau began an inquiry into an incident involving the shooting of an innocent man by a policeman. The committee met in secret executive session, and excluded an *Oregon Journal* reporter (see *PCN V*, p. 69).

The Oregon open meeting law states that newspersons "shall be allowed to attend executive sessions."

On June 3, New Oregon Publishers, Inc. filed suit challenging the exclusion, claiming that it violated the open meetings statute.

In seeking to dismiss the suit, the defendants (the mayor, police chief, and committee members) asserted that the executive session was justified because the group was reviewing criminal investigatory information and records.

In response, the publishers deny any intention of challenging the right to hold executive sessions. They argue, however, that the open meetings law permits newspeople to attend such sessions.

73. PENNSYLVANIA ENACTS NEW SUNSHINE LAWS; WEAKENING AMENDMENT INTRODUCED

On July 19, the Pennsylvania legislature enacted a new "sunshine" law, which requires open meetings for all state and local governing bodies, including school boards, the state legislature and the governor's cabinet (see *PCN V*, p. 67). The law also requires that notice of these open meetings be published in the state's newspapers.

In late October, state Senate Majority Leader Thomas F. Lamb introduced legislation that would exempt meetings of the state General Assembly from the notice requirements. The bill is presently in committee.

74. SUNSHINE LAWS—A BRIEF OVERVIEW

Open meetings ("Sunshine") laws are now in effect in 48 states. Only Mississippi and West Virginia have no sunshine provisions on the books. Most of the laws, however, contain limitations, such as exceptions for executive sessions and discussions of personnel problems.

The Tennessee statute (chapter no. 442, Public Acts of 1974) is considered to be the toughest sunshine law. It requires that all meetings of any governing body to be open to the public. There is no exception for executive sessions. The Tennessee law also provides that notice of all meetings must be given and that full minutes must be kept. The law gives the courts power to issue injunctions and impose any other equitable remedy to "enforce the purpose of the Act."

Chattanooga Times 75.

Recent cases arising under the Tennessee sunshine law include the following:

In August, reporters for the *Chattanooga Times* and the *Oak Ridger* invoked the Tennessee Sunshine Law when they were denied admission to meetings of two different school boards.

In early September, the newspapers filed separate suits against the school boards, asking for injunctive relief and any other penalties necessary to enforce the letter and spirit of the law. The suits are still pending.

Freedom of Information/State

WAGG

76. Ralph Dawson, news director of Franklin (Tenn.) radio station *WAGG*, sued the Williamson County School Board, alleging that the board had violated the state's new "Sunshine Law". The suit charges that the board: (1) failed to give public notice of two meetings held in July between the school board and the Williamson County Educational Association; (2) failed to keep minutes of the meetings; and (3) closed the meetings to the public. The lawsuit asks the court to void any decisions on teachers' pay raises which may have been made during the meetings.

77. HOUSTON POLICE DENY PRESS ACCESS RECORDS (See this *PCN*, p. 54)

Government Harrassment

78. FBI MAKES "OFFICIAL" VISIT TO PROTEST CATHOLIC PRIEST'S COLUMN

In a column appearing in *The Western Catholic* on June 23, Rev. Andrew Greeley criticized the FBI for its handling of the Symbionese Liberation Army/Patricia Hearst case which climaxed in a Los Angeles shoot-out. The column was also distributed to newspapers across the country by the Universal Press Syndicate.

FBI Director Clarence Kelley responded to the column with a letter which was printed by *The Western Catholic* in its August 4 issue. Nearly a month later, two FBI agents made an "official" visit to hand deliver a copy of the letter to the office of the Universal Press Syndicate. No threats were made either to Greeley or to the agency. The columnist said he feels that the visit had a "clear message" and had an intimidating effect.

NOTE: For stories of similar FBI incidents, see *PCN IV*, p. 47 and *PCN V*, p.40.

79. US SUPREME COURT POLICEMAN POSES AS NEWSMAN

When a pro-abortion group sought to hold a rally on the steps of the Supreme Court last year, it learned that the policy of the Supreme Court, which has jurisdiction over its own grounds, forbids demonstrations in or around the building. The rally was then moved across the street to the grounds of the Capitol.

During the demonstration, Supreme Court Police Lt. James Zagami dressed in plainclothes and, posing as a news reporter, attended the rally with a tape recorder.

Barrett McGurn, the Supreme Court's press officer, confirmed the incident but maintained Zagami acted without the knowledge of court officials. However, according to *New Times* reporter Nina Totenberg, who broke the story, Zagami was acting with the approval of his supervisors and was supplied with expensive camera equipment. Since the story was published, Totenberg said, Zagami has been "punished by being rotated to night duty."

WASH. STAR-NEWS CAMERAMAN ACQUITTED OF DISORDERLY CONDUCT CHARGES 80.

Washington *Star-News* photographer Geoffrey Gilbert was charged with disorderly conduct in June following a scuffle with police as he attempted to photograph a traffic arrest outside the *Star-News* building (see *PCN V*, p. 72). Gilbert claimed that he was hit in the chest with a nightstick and wrestled to the ground.

Star-News managing editor Charles Seib said that police deliberately exposed two rolls of film confiscated from Gilbert's camera and thereby destroyed pictures of the arrest and other news photos.

A D.C. Superior Court judge acquitted Gilbert of disorderly conduct charges in September after concluding that Gilbert and a police officer "inadvertently collided." In an oral opinion delivered from the bench, the judge did not draw any conclusions about the exposure of the film and cleared the police of any charges of police brutality.

LOUISVILLE REPORTERS ARRESTED FOR EAVESDROPPING ON POLICE SESSION 81.

Last May, two Louisville reporters, Howard Fineman of the *Courier-Journal* and Jerry Hicks of the *Times*, were arrested and charged with disorderly conduct because they listened outside the door of a closed session of the local Fraternal Order of Police. The newsmen spent 2½ hours in the city police lock-up before the *Courier-Journal* and *Times* Company posted bail.

The participants in the police meeting, including the police chief and legal counsel, also seized the reporters' notes and a tape recorder. The Fraternal Order of Police later asked the U.S. Attorney to convene a federal grand jury to investigate a possible violation of a federal anti-bugging statute. The machine had not been turned on during the meeting and there was nothing on the tape. The grand jury did not indict the newsmen.

In early October, Judge Benjamin Shobe ordered a Louisville police court jury to acquit Fineman and Hicks on the disorderly conduct charge. The judge ruled that the prosecution had not demonstrated that the reporters had disturbed the meeting.

82. ATLANTA POLICE DENY PRESS PASSES TO TWO ALTERNATIVE NEWSPAPERS

Atlanta police chief John Inman refused in August to issue city press identification passes to news staff members of the *Atlanta Voice* and the *Great Speckled Bird*. According to the *Voice*, Inman claimed the issuance of press passes was "privileged." *Voice* staff member Gregg Mathis, however, attributes the denial of passes to "critical investigative reports" of the Atlanta police department by both newspapers.

The *Voice* is the state's largest black newspaper. The *Bird* is one of the oldest and best known underground papers.

Despite Inman's refusal to authorize the passes, Atlanta Mayor Maynard Jackson issued both papers press identification signed by Inman and sent to the Mayor for distribution.

NOTE: See *PCN* V. p. 56 for a suit by two newsmen seeking White House accreditation. Also see *PCN* V. p. 43 regarding a police spy plant on the *Voice* staff.

83. INDIANAPOLIS REPORTERS INDICTED AFTER ALLEGING POLICE CORRUPTION AND PROSECUTORIAL MISBEHAVIOR

Since February, Richard E. Cady and Williams E. Anderson, reporters for the *Indianapolis Star*, have been investigating corruption in the Indianapolis police department and the Marion County prosecutor's office.

The investigation initially focused on police graft and protection of prostitution, narcotics, bootlegging and gambling. These allegations were based largely on information allegedly supplied by 28 confidential police department sources.

When only five policemen were indicted for illegal activities, the reporters began to look into the way County Prosecutor Noble Pearcy was presenting the cases to the three grand juries that were investigating police corruption. After interviewing 78 former grand jurors, the reporters wrote that it appeared that Pearcy had manipulated the grand jury deliberations.

According to the *Star*, Cady and Anderson were contacted in March by Larry Keen, a police informer whom the reporters considered unreliable. Keen told the reporters that at a particular time and place he was going to pay off a police officer. The reporters, "as a matter of curiosity," went to the scene and saw Keen pass an envelope to a police lieutenant.

The indictment has been widely criticized by press groups, lawyers and politicians. Robert D. Early, the managing editor of the *Indianapolis Star*, called the indictment "a carefully orchestrated frame-up," and the president of the Indianapolis Bar Association said that the indictment amounted to a "cynical disregard" of freedom of the press. Two independent press groups are launching investigations into the charges against the reporters.

Senator Birch Bayh (D- Ind.) and *The Reporters Committee for Freedom of the Press* have both sent letters to Attorney General William Saxbe, urging that the Justice Department investigate whether Cady's and Anderson's civil rights had been violated by the indictment. In its letter *The Reporters Committee* stated that the indictment was a corruption of "the state criminal justice system in an attempt to intimidate these reporters...from exercising their ...civil rights to investigate and write about governmental affairs."

As yet, there has been no response to these letters by the Justice Department.

Because of this incident a Marion County grand jury on September 12 handed down an indictment charging Cady and Anderson with conspiracy to bribe a police officer. Neither the informer nor the police officer were indicted.

84. WHITESBURG MOUNTAIN EAGLE BURNED DOWN; POLICEMAN ARRESTED; ARSON SUSPECTED

On August 1, the *Whitesburg* (Ky.) *Mountain Eagle* burned to the ground. Tom Gish, editor of the *Eagle*, was unsuccessful at the time in convincing state police to investigate the cause of the fire despite an additional request made by the Whitesburg Fire Chief. The paper has developed a national reputation for its investigations of strip mining and mine safety hazards which has made it unpopular with local mine owners and officials.

Two weeks later, a cleanup crew discovered kerosene-soaked envelopes inside Gish's office. The *Reporters Committee*, by counsel, asked the Justice Department to start an investigation. The state then started its own ten-week investigation which appeared to center on Gish and his immediate family. At one point investigators asked them to take lie detector tests.

The tests became unnecessary when investigators handed down warrants October 18 charging a Whitesburg policeman and three others with the *Eagle* arson.

Eagle Still Screams

The fire caused $30,000 in damage by completely destroying the newspaper office and its equipment. The *Eagle* has continued to meet its weekly deadline and serve its 5,700 readers as usual. Gish, typing copy at home and using improvised equipment to put the paper out while awaiting delivery of new production machinery, has continued to publish his critical assaults on the Kentucky strip mining interests, coal operators, truckers, police and local government officials.

The effects of the fire have caused at least one important change in the newspaper. The two-word slogan formerly appearing on the *Eagle's* masthead proclaiming that "IT SCREAMS" has been changed to read: "IT STILL SCREAMS."

(See this *PCN*, p. 20 for a story about a $100 document fee assessed to the *Eagle* by the T.V.A.)

III CONFIDENTIALITY OF NEWS MEDIA SOURCES

State Executive

1. CALIF. POLICE USE NO-NOTICE WARRANTS TO SEARCH MEDIA FILES AND TO AVOID SHIELD LAW PROTECTION

In 1972, in a case involving the *Stanford* (University) *Daily*, a federal judge in California ruled that no-notice police search-warrant raids of news offices violated the First and Fourth Amendments (see *PCN II*, p. 14 and *PCN V*, p. 33). He said that police should pursue the less drastic alternative of the subpoena process because it would give the news organization notice and an opportunity to raise First Amendment objections in court before producing the material and would preclude the danger of police sifting at will through confidential news files.

In addition, California has a strong law barring subpoenas for confidential news sources—a law which is completely useless if police decide to use search warrants to obtain what they can't get by subpoena.

Despite the clear holding of the *Stanford Daily* decision and the state shield law, police in California continue to conduct no-notice searches of news offices. There have been at least four such searches in the past year of the *Los Angeles Star*, the *Berkeley Barb* (two warrants served on the *Barb's* attorneys) and of radio stations *KPFA-FM* in Berkeley (see *PCN IV*, p. 25), *KPFK-FM* in Los Angeles and *KPOO-FM* in San Francisco.

The searches of the radio stations were all directed against stations with strong informational links to the radical community and with known policies of protecting confidential news sources. Two of the searches —of *KPFK* and the *L.A. Star*—were prolonged, massive searches of news offices where police also seized documents apparently unrelated to their investigations.

2. LOS ANGELES POLICE CONDUCT NO-NOTICE SEARCH OF RADIO STATION FOR 8 HOURS AND SEIZE FILES

In October, Los Angeles Pacifica station *KPFK-FM* received a communique from the "New World Liberation Front" relating to a recent bombing of the Sheraton Airport Hotel in Los Angeles. *KPFK* broadcasted portions of the communique as a news item and released the full text to other news organizations.

Los Angeles police officials demanded the station turn over the original of the communique. Station officials gave the police a copy of its contents but refused to turn over the original, citing the First Amendment and the California shield law.

On October 10, representatives of the Los Angeles Police Department arrived at *KPFK*'s studios with a no-notice search warrant and, for over eight hours, conducted a complete search of all the station's files and facilities. Although the police did not find the original communique, they rifled the files and seized documents belonging to the station.

The *Los Angeles Times*, the Los Angeles Press Club and Sigma Delta Chi have joined *KPFK* in condemning the search. The station is planning to file suit against the police.

3. CALIF. STATION HIT WITH SEARCH WARRANT GIVES UP RADICAL COMMUNIQUE TO POLICE

San Francisco radio station *KPOO* is a self-styled "Third World inner city community station" that is almost entirely listener-supported and volunteer-operated. Along with several other alternative radio stations and newspapers in California, *KPOO* has received communiques from the "New World Liberation Front," claiming credit for a series of West Coast bombings of ITT facilities.

On October 16, *KPOO* received a photocopied letter from the extremist group announcing the bombing of the ITT-owned Sheraton Palace Hotel in San Francisco and demanding the release of Chilean political prisoners. The only person at the station, who was broadcasting a music show, called the police and told them about the letter.

Seven San Francisco policemen and one F.B.I. agent arrived at the station and asked for the letter. Other station officials who had been contacted in the interim refused to relinquish it without a court order.

Station Clarifies Policy

The police then obtained a search warrant and returned to the station where they were given the letter.

The next day, the New World Liberation Front contacted *KPOO* and demanded that station officials go on the air that day to explain station policy with regard to cooperating with law enforcement authorities.

KPOO staff people then met and announced that all material sent to the station would be considered as "public domain" for broadcast purposes and would be distributed to other news media. They said that the station would not act as a "police information agency" and would respond to law enforcement requests only if there was a court order in which a *KPOO* attorney had participated.

Two weeks later, *KPOO* received another communique from the New World Liberation Front which "instructed" the station not to divulge any information to the police and not to give copies of communiques to the press.

4. L.A. POLICE MAKE NO-NOTICE RAID USING CRIMINAL LIBEL LAW: FILES SEIZED

On October 15, the *L.A. Star*, a weekly Southern California tabloid, published a composite photograph superimposing a picture of actress Angie Dickinson's face on the shoulders of an unidentified nude female body in a sexually explicit pose.

Two days later on October 17, Dickinson signed a crime report but said she would not go to court to prosecute. The Los Angeles city attorney's office then filed a criminal libel complaint against Paul Eberle, his wife Shirley and Mickey Leblovic, publishers of the *Star*.

The California criminal libel law provides for fines of up to $5,000 or up to one year imprisonment in the county jails for actions of "malicious defamation tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation of one who is alive and thereby expose him to public hatred or ridicule." Under the law, truth may be asserted as an affirmative defense.

That same day, police using search warrants, seized the printing plates and layout sheets used to publish the October 15 paper from a printing facility in nearby Riverside, California.

Later that night, police also seized 12 manila folders containing artwork, photographs, editorial copy and address books from the *Star* editorial offices pursuant to a search warrant but without a prior judicial adversary hearing.

The following day, publisher Eberle was arrested and charged with a misdemeanor for violation of the California criminal libel statute.

In response to these actions, *Star* attorneys have filed a $1 million damage complaint in federal court against the Los Angeles police department charging them with unlawfully exercising a prior restraint against publication in derogation of the First Amendment and seizing news material without a prior adversary hearing.

The suit seeks declaratory and injunctive relief against further prosecution under the California criminal libel statute, challenges its constitutionality and requests the return of materials taken by police during their search.

5. BERKELEY BARB HIT WITH SEARCH WARRANTS FOR RADICAL DOCUMENTS

The *Berkeley Barb* has been subject to two search warrants in the past year for documents sent to the paper by radical sources: one warrant from Alameda County police in February for a letter from the Symbionese Librarion Army on the Patricia Hearst kidnapping and the other in June from the F.B.I. for a letter from the Black Liberation Army.

Because the *Barb* staff had given the documents to their attorneys, both warrants were served on the attorneys who then turned over the letters.

After the *Barb* received and printed several communiques from the New World Liberation Front in October, staff members notified law enforcement officials that they would no longer automatically release documents in response to police warrants or subpoenas. The *Barb* staff is currently devising a policy for handling confidential material sent to the paper.

6. FEDERAL COURT BARS NO-NOTICE POLICE SEIZURE OF MAGAZINES

In July, 1973, representatives from the Tulsa, Oklahoma, district attorney's office, accompanied by a Tulsa County judge, confiscated over 100 boxes of allegedly pornographic materials belonging to the Sooner State News Agency, a magazine wholesaler. The Agency was given no advance notice of the search and filed suit later that month seeking the return of their materials.

A three judge federal panel concluded in December, 1973 that the confiscated newspapers, films and books were "presumptively within the protection of the First Amendment. A mass seizure of such material," the panel said, "without a prior adversary hearing and a determination therein that the material is obscene, constitutes a prior restraint on the circulation of presumptively protected material and as such violates the federal Constitution."

The judges ordered the return of the confiscated materials but allowed the D.A.'s office to retain a single copy of each item seized to be used in evidence in criminal prosecutions for violations of the obscenity statutes.

State Legislative

7. OKLAHOMA PASSES WEAK SHIELD LAW; PERMITS SUBPOENAS FOR "RELEVANT" INFORMATION

The Oklahoma Legislature has passed, and Gov. David Hall has signed, a limited newsman's privilege law. The new statute provides that no newsman will be required to reveal any of his sources or turn over unpublished information unless a court determines that the information sought "is relevant to a significant issue in the action and cannot be obtained by alternate means." The law also does not apply to defamation actions in which reporters base their defense upon confidential sources or unpublished information.

The law appears to be one of the weakest in force, mainly because, under the rules of evidence, virtually any information is considered "relevant." The statute is similar to the Justice Department Guidelines ("There should be sufficient reason to believe that the

information sought is essential to a successful investigation...The Government should have unsuccessfully attempted to obtained the information from alternative non-press sources"), and the looseness of those Guidelines may have resulted in their abuse (see Tom Blackburn story, this *PCN*, p. 39 and Will Lewis story, this *PCN*, p. 38).

Oklahoma is the twenty-sixth state to have enacted some form of reporters' shield. The other 25 are: Alabama, Alaska, Arkansas, California, Delaware, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, and Tennessee. *The Reporters Committee* will supply texts of these statutes upon request.

8. HAWAII COUNTY PASSES FIRST LOCAL SHIELD LAW IN NATION

On November 5, voters in the County of Hawaii approved a county charter amendment which provides that "no legislative or administrative body, or any other County body having the power to issue subpoenas" shall be able to force a reporter to disclose "the source of any information procured...for publication." The amendment, which took effect immediately and cannot be repealed except by a future referendum, passed on a 12,886-9,655 vote.

As far as *The Reporters Committee* is aware, the County of Hawaii is the first political subdivision below the state level to grant legal protection for reporters. It is also the first time that the question has been placed before the voting public on a general election ballot.

The state of Hawaii does not have a shield law.

9. WISCONSIN BILL TO PROTECT MEDIA TELEPHONE RECORDS DIES

Wisconsin State Rep. Edward Nager (D-Madison) sponsored legislation which would have prohibited telephone companies from disclosing private telephone and telegraph records in matters not related to the purposes of billing (see *PCN IV*, p. 25). Introduced in February, Assembly Bill 1640 was approved by the Assembly Judiciary Committee by an 8-3 margin on March 29, but died when the legislature adjourned in June.

10. CALIFORNIA PASSES ABSOLUTE SHIELD LAW; PROTECTS BOTH SOURCES AND CONTENT OF UNPUBLISHED INFORMATION

California's current shield law (Section 1070 of the California Evidence Code) provides that a reporter cannot be held in contempt by any judicial, administrative or legislative body for refusing to disclose "the source of...published" information. The law, however, does not appear to protect newsmen who refuse to reveal the source of unpublished information.

On March 13, state Sen. Alfred J. Song (D-Monterey Park) and 11 co-sponsors introduced S.B. 1858 to extend existing protection to cover the source and content of all unpublished materials, including newsmen's notes, film, and tape recordings. The bill passed in the final weeks of the legislative session and signed by Gov. Ronald Reagan in late September. The new law will take effect in January 1975.

11. CALIF GIVES SHIELD LAW RIGHTS TO MAGAZINE REPORTERS

A second amendment to California Evidence Code Section 1070 was A.B. 3148, which extends reporters' privilege to persons "connected with or employed upon a...magazine or other periodical publication." The bill, introduced by State Assemblyman Alan Sieroty (D-Beverly Hills), was approved both by the Assembly (64-0) and Senate (21-13) and was signed by Gov. Ronald Reagan in late September. This was done because the existing law, even with the Song amendment, did not protect writers for periodical publications.

The California law now reads:

"A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, cannot be adjudged in contempt by a judicial, legislative, administrative body, or any other body having the power to issue subpoenas, for refusing to disclose the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

'Unpublished information" includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated."

Confidentiality

State Subpoenas & Contempts

12. LUCY WARE MORGAN CASE PENDING

Two criminal contempt of court citations carrying prison sentences of 8 months are still pending against *St. Petersburg Times* reporter Lucy Ware Morgan for refusing to identify a confidential news source in a grand jury probe (see *PCN IV*, p.16 & *PCN III*, p.9).

13. MIAMI HERALD REPORTER SUBPOENED FOR INTERVIEW WITH RAPE VICTIM

The Miami Herald published an interview on December 23, 1973 describing the experiences of an alleged rape victim, "Lisa," as told to Bea Hines, a *Herald* reporter.

The state charged Austin I. Stoney in connection with the alleged rape. Lawyers for Stoney then sought to subpoena Hines to require her to testify at the trial and to produce "all notes, memoranda, news articles and all other writings" concerning "Lisa," whom they said would be the principal prosecution witness.

The defense lawyers said they were planning to show at trial alleged inconsistencies between various statements made by the alleged rape victim. For that purpose, they said they would first call another witness, who had been present at Hines' interview with "Lisa." But they said Hines' testimony would be needed if the first witness' testimony was impeached on cross-examination.

On August 13, a Florida state court judge granted Hines' motion to quash the subpoena.

The judge relied primarily on First Amendment grounds. He said there had been no showing of a compelling need for the reporter's testimony and notes, and no indication that the information sought was not available from other sources.

Therefore he ruled that the First Amendment prevailed, protecting a reporter's right in a criminal case not to reveal sources and unpublished information unless evidence is "so important" that its non-production would violate the defendant's constitutional rights.

14. FLORIDA REPORTER SUBPOENAED OVER FAULTY BUILDING REPORT

The October 29, 1974 issue of *The* (Jacksonville, Fla.) *Times-Union* carried a story by reporter Randolph Pendleton about a downtown Jacksonville building which was then the subject of a civil lawsuit. Pendleton quoted named federal government housing officials as saying a portion of the building had been condemned because of cracks and other structural damage. The building's owner, claiming the damage had been caused by the recent erection of an adjacent building, was suing the contractors responsible for its construction.

A defense attorney in the civil action served Pendleton with a subpoena directing him to testify by deposition about his October 29 article and to produce all of his notes relating to the article.

The subpoena did not indicate the scope of the planned questioning, and the reporter's story had not referred to any unnamed confidential sources. There were indications, however, that the defendants in the lawsuit wanted to learn who put Pendleton on to the story about the government condemnation proceeding.

One hour before the scheduled deposition of November 1, a Florida state court judge granted Pendleton's motion to quash the subpoena.

Describing the subpoena as an apparent attempt "to inquire into the gathering of news and the sources thereof," a judge ruled that no showing had been made to justify "what would appear on its face to be a violation of the First Amendment freedoms of the news media."

The judge said that even in criminal cases, a compelling need for the information sought from a reporter must be shown under the Supreme Court's *Caldwell* decision, and he noted that this was a civil case.

15. NEW YORK TIMES REPORTER SUBPOENAED FOR POLICE HOMICIDE STORY

On April 28, 1973, a 10-year-old Queens, N.Y., boy was shot to death by Police Office Thomas J. Shea, after the boy and his stepfather had allegedly fled when Shea and his partner sought to question them about the nearby holdup of a cab driver. The shooting was followed by scattered violence in the neighborhood, and formal protests by community and civil rights leaders.

Two days after the shooting, *New York Times* reporter Ronald Smothers published an interview with the boy's stepfather, Add Armstead, who gave his account of the incident.

Officer Shea was charged with murder in the boy's death. Armstead was the chief prosecution witness at Shea's four-week trial in May and June of 1974.

Toward the end of the murder trial, defense attorneys subpoenaed Smothers to testify. They claimed that the reporter's testimony was needed to bring out alleged discrepancies between Armstead's published account of his stepson's shooting more than a year earlier, and his testimony at trial.

Sources Not Sought

One of the defense lawyers argued he was "not asking for his notes or sources but only if what he wrote was said to him by Mr. Armstead."