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# Contents



*Knarled tree branches on the Carolina coast. Photo by Carson Graves.*

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## Criminal Code Commission's Recommendations for

# PRETRIAL PROCEDURES

William R. Britt

The Criminal Code Commission has worked long and hard for over two years to bring to the General Assembly a bill rewriting some essential facets of our pretrial criminal procedure. The result is a momentous and important legislative proposal.

### Background

Let me briefly trace the background of this bill. Attorney General Robert Morgan, during his campaign for Attorney General in 1968, sensed a growing public concern about the administration of justice and the general efficiency and effectiveness of our criminal justice system. One recurring criticism was that criminal law and procedure as stated by the General Statutes in Chapters 14 and 15 was hopelessly outdated and, as written, little resembled the actual practice of criminal law in courts. Law enforcement officers and citizens could not readily understand their rights and duties in the administration of justice.

To ascertain objectively whether these criticisms had substance, the Attorney General named an *ad hoc* committee to examine and study the law and recommend action.

The committee was made up of lawyers, judges, and nonlawyers from across the state, who pursued their task with enthusiasm and a sincere desire to define the heart of the problem of our criminal law and procedure.

Appointed in August 1969, the committee worked diligently and reported to the Attorney General on July 1, 1970. Though its recommendations were extensive, the gist of its findings was that North Carolina criminal law and procedure needed careful study, analysis, review, and possibly revision. The committee urged the Attorney General to appoint a blue-ribbon commission to perform the analytical review and possible revision of the criminal law. The committee also recommended that criminal procedure receive first priority, since passage of time, changes in other parts of statutory law, and federal court decisions about procedural due process and constitutional rights had made the statutory language of Chapter 15 of the General Statutes antiquated and inappropriate. Chapter 15's patchwork makeup evolved over many years and contributed to a widely held opinion that in many cases the criminal procedure actually practiced in our courts today did not much resemble the procedure prescribed in Chapter 15.

### Criminal Code Commission Created

In August 1970 the Attorney General applied to the Committee on Law and Order for a beginning grant to select and appoint the commission for the analytical review and revision. The grant was approved on a 75 per cent/25 per cent federal-state matching basis.

Bench, bar, and civic groups were solicited for nominees to work on the commission. Over 400 nominations were received and some of these were mentioned by several different persons as suitable members. After careful attention to geographic, political, and philosophical balance, in November 1970, 26 members were appointed to the Criminal Code Commission. The commission was bipartisan, biracial, and geographically well-distributed; it also included nonlawyers.

The commission's first meeting was held in December 1970, and the Attorney General appointed Assistant Attorney General Sidney Eagles to act as secretary and staff director.

This article is based upon a speech William Britt delivered to the Board of Governors of the North Carolina Bar Association on January 18, 1973. Mr. Britt is chairman of the Criminal Code Commission and an attorney in Smithfield, N. C.

I have been privileged to serve this commission as chairman. It has been an educational experience. Some of the top lawyers in North Carolina debated the state of the law, what law ought to be, and the policy considerations behind each of the concepts. The commission as a group has approached its work with the highest degree of sustained determination that I have ever witnessed. It was fortunate to have as its vice-chairman Mr. Allen Bailey of Charlotte; and as committee chairmen, Mr. Bailey, former Senator John Boger of Concord, Judge Robert Rouse of Farmville, and Professor Kenneth Pye of the Duke University Law School in Durham.

The commission authorized hiring consultant draftsmen on a part-time consulting basis. The consultants selected were Professor Leon Corbett, Jr., assistant dean of the Wake Forest University School of Law—a former Revisor of Statutes and secretary to the General Statutes Commission; Professor Walter Dellinger of the Duke University Law School, a Charlotte native who clerked for Mr. Justice Black of the United States Supreme Court; and, by special arrangement with John Sanders, director of the Institute of Government in Chapel Hill, Assistant Directors Poindexter Watts and Douglas Gill—who have studied and taught in this area and have worked on other drafting projects in the past.

## Organization and Work of the Commission

The commission agreed to divide into three working committees, each supported in research and drafting by the draftsmen-consultants. Every member of the commission was assigned to one of the three committees.

The commission agreed that criminal procedure should be the first order of business and prepared a tentative listing and proposed agenda to attack the problems in criminal procedural law and practice.

The commission agreed that the General Assembly's sanction and approval was desirable and that a resolution should be drawn up to express to the General Assembly the general nature of the commission's work and goals. The General Assembly approved the joint resolution, which also provided that the Attorney General appoint a 26-member Criminal Code Commission (1971 Joint Resolution 24).

Since its first meeting in December 1970, the commission has met 23 times, sometimes from early morning until late evening. To ask suggestions from the bar, the commission met at the Bar Association's Annual Meeting in 1972. Other interested groups have been asked for their criticisms of the present law and suggestions for improving it. The commission has carefully considered each of these ideas and comments and has incorporated many of them into the final bill.

The commission's goal has been to prepare a balanced legislative reform that would eliminate practices that frustrate the effective and efficient administration of justice—regardless of who benefited from the practices.

The careful balance in commission membership helped to insure that neither prosecution nor defense would be unduly disadvantaged or inconvenienced. The members of the commission included: Allen Bailey, Charlotte defense lawyer; Superior Court Judge James H. Pou Bailey; Professor Rhoda Billings, former district court judge; Representative David Blackwell, formerly clerk of superior court and now a practicing attorney; John Boger, a practicing lawyer and former state senator from Concord; Glenn Brown, former solicitor and member of the State Bar Council from Waynesville; Phil Carlton, chief district court judge from Pinetops; James Carson, former representative, now a Charlotte criminal defense lawyer; David Dansby, Greensboro defense lawyer; Dean LeMarquis DeJarmon, dean of the North Carolina Central University Law School in Durham; Senator Phil Godwin, former Speaker of the House from Gatesville; Herbert Hulse, Goldsboro defense lawyer and president of the Wayne County Bar; Assistant Attorney General Dale Johnson, former assistant solicitor in Clinton; Mrs. Annie Kennedy, Winston-Salem defense lawyer; Superior Court Judge and former solicitor Charles Kivett of Greensboro; Professor John Kozy, head of the Department of Philosophy at East Carolina University; Sheriff Robert Pleasants, sheriff of Wake County; Professor Kenneth Pye, acting dean of the Duke University Law School and former chancellor of Duke University; Speaker of the House James Ramsey, a Roxboro defense lawyer; Superior Court Judge Robert Rouse of Farmville, a former solicitor; Representative Wade Smith, a Raleigh defense lawyer; Senator Thomas Strickland, a Goldsboro defense lawyer; Solicitor Jack Thompson of Fayetteville; Henry Whitesides, a practicing lawyer and former solicitor from Gastonia; and Charles Winberry, a practicing lawyer and former chief district court prosecutor from Rocky Mount.

## Philosophy of the Commission's Proposal

Any fear that the Criminal Code Commission might recommend a legislative proposal so one-sided in its appeal (that is, overly prosecution- or defense-oriented) as to be unacceptable to others involved in the administration of criminal justice in North Carolina has proved unfounded.

The 1973 legislation proposed by the Criminal Code Commission generally contains items that should be well received by prosecutors, administrators, judges, and defense counsel alike. Though parts of the bill when viewed alone might prompt concern, the overall approach of this bill is balanced and "citizen-oriented."

Even though this bill departs at times from more traditional ways of handling criminal cases in the courts, it is a "citizen's bill" in that it is designed to serve the general public by saving the citizen's time as a juror, witness, and victim-witness.

The Commission considered the best of North Carolina practice, the suggestions of the American Bar Association Standards for Criminal Justice, the Model Code of Pre-Arraignment Procedure of the American Law Institute, the proposed Federal Criminal Code, and the new criminal procedure codes or proposals of New York, Illinois, and other states.

## Highlights of the Proposal

● *Record Entry and Withdrawal of Attorney.* The proposed bill for the first time provides for a written entry and withdrawal of attorneys in criminal cases. That is, when attorneys accept the responsibility for a criminal case, they will file a paper with the clerk's office and indicate the extent of their involvement in the case. An attorney may limit his involvement in a case or withdraw if he shows good cause.

● *Inquest Procedure.* The bill attempts to meet the need for an impartial inquest into suspicious or controversial deaths in those counties that have no coroner. An inquest mechanism would, when triggered, create an inquest jury that would be responsible for determining the cause of death, whether the death was a homicide, and whether there is probable cause to believe that any identifiable person caused the homicide. The commission believed that an impartial forum, not tied to a law-enforcement agency, would assure that there would be a complete and impartial investigation in emotion-charged cases. The very presence of this type of impartial mechanism safeguards against civil violence and disorder.

● *Investigative Procedures.* Detailed statutes cover police and law-enforcement investigation procedures. We dealt with stopping someone for a limited time for investigation. Although the commission thought 20 minutes should be the maximum time allowed, it also felt that, for his protection, the officer should have the authority to frisk for dangerous weapons. We spelled out the procedures for search and seizure by consent, searches and seizures at arrest, and the issuance of statewide search warrants by superior court judges and judges of the appellate division.

● *Searches and Seizures.* The commission's detailed treatment of applications for search warrants eliminates much potential cause for concern. The issuing official may accept oral statements under oath instead of the affidavit establishing probable cause. The oral statements can be given in person or by radio or telephone but must be transcribed in order to have the same effect as an affidavit. We have provided for execution of search warrants without notice in some cases: (1) when giving notice would endanger the life and safety of any person, or (2) when the judge issuing the warrant authorizes execution without notice.

Any person served with a search warrant must be furnished a copy by the officer, and a copy must be left at any searched premises or vehicle.

Once the material specified in the warrant has been seized, the search must stop. The person searched must receive an inventory of the items seized. If necessary for the officer's safety, the persons present at the site of the search may be frisked or "patted down" for dangerous weapons. We have, however, carefully avoided tampering with inspection warrants and the vehicle warrants of the Riot and Civil Disorders Act.

● *Nontestimonial Identification Procedure.* The proposed bill includes procedures for questioning and for nontestimonial identification—that is, taking body fluid samples, hair samples, fingerprints, palm prints, etc., in serious cases (those punishable by more than one year of imprisonment).

Nontestimonial-identification orders are enforceable under the contempt powers of the court. In conducting the authorized procedures, no unreasonable or unnecessary force may be used. No one can be detained for longer than is necessary to conduct the test, and unless arrested, a person may not be detained for more than six hours. A defendant is entitled to have counsel present. The defendant himself may ask the judge to order a nontestimonial-investigation procedure.

● *Action Authorized in Case of Urgent Necessity.* The bill grants authority for law enforcement officers to take action urgently necessary to save life, prevent serious bodily harm, or protect the public interest.

● *Electronic Eavesdropping and Wiretapping.* In one of the commission's more controversial actions, it agreed upon a severely restricted electronic-surveillance authority. Generally, electronic surveillance is prohibited except in carefully defined situations. Likewise, the proposed bill makes it generally unlawful to manufacture, distribute, or possess surveillance devices in this state. Only a court order applied for by the Attorney General or a district solicitor with the approval of the Attorney General and signed by a resident or presiding superior court judge may authorize electronic surveillance. It is authorized only in operations involving organized crime or offi-

cial corruption: larceny and receiving stolen property, bribery, buying and selling offices, willfully failing to discharge duties, felony violations of the Controlled Substances Act, and conspiracies involving any of the above offenses.

The maximum duration of surveillance is 30 days, with a permissible extension for an additional 15 days when good cause is shown. The court may require progress reports on a periodic basis. To guard against abuse, in addition to the stringent limitations contained here, we have created a civil action for actual damages, punitive damages, and reasonable attorney's fees.

● *Provisions Relating to Criminal Process.* The bill clarifies our criminal procedure substantially by concisely defining each type of process that may be used to bring people before the criminal courts and the limitations on each. To correct an abuse involving stale outstanding warrants, the bill requires that all arrest warrants, orders of arrest, and criminal summonses be returned to the clerk within 90 days. Throughout the bill, the more understandable language "order for arrest" is substituted for the Latin term "capias." Criminal process includes the citation, criminal summons, warrant for arrest, and order for arrest.

● *Arrest Powers and Procedure.* The bill clarifies the standards of duty of the arresting law enforcement officers, including the circumstances when they may arrest with or without a warrant.

The much abused concept of the "citizen's arrest" has been eliminated, though the authority for a private person to *detain* another if a serious offense is committed in his presence has been retained.

Extensive benefits are provided for private persons who assist law enforcement officers on request and suffer harm, but the substantive crime of failing to assist an officer has been eliminated.

Police processing and duties on arrest as well as an officer's obligation to take an arrested person for an initial appearance before a magistrate without unnecessary delay have been substantially clarified. When commitment is called for, any confined person must be physically accompanied by a written commitment order that clarifies and explains the terms of his commitment. A copy must accompany him wherever he goes.

● *Bail Provisions.* The bill's bail article favors pretrial release without bail but provides for the traditional types of bail and a 10 per cent bail deposit system. Judicial officials have wide latitude in determining under what conditions they will order a defendant's pretrial release. A bail bond, once posted, is effective and binding throughout all stages of the proceeding in the trial division.

The bill calls for the senior resident superior court judge and the chief district court judge to act together and issue recommended policies on pretrial release. Release on bail for defendants after conviction is authorized under conditions that reasonably assure the defendant's presence and provide protection to the community. Orders of pretrial release may be modified by the judge who issued them or by a superior court judge if a district court judge set bail. The solicitor may at any time move for modification or revocation of an order of release. A surety may surrender his principal to the sheriff and receive a receipt, thereby exonerating himself from his bond.

All sheriffs, deputies, law enforcement officials, judges, magistrates, attorneys, probation officials, court employees, and their spouses are barred from the bonding business. The bill includes more stringent attention to forfeiture of bonds and a careful monitoring of the remittance of forfeited bonds.

● *Pretrial Court Hearings.* In addition to the initial appearance before the magistrate, the law provides for a first appearance before a district court judge in preliminary proceedings. First appearance must be held within 96 hours after the person has been taken into custody or at the first regular session of district court—whichever is earlier; if the defendant is not in custody or is on pretrial release, first appearance must be held within seven days or at the next session of district court held in the county—whichever is later. One purpose of this first appearance is to assure the defendant's right of appointed counsel, if appropriate, and to encourage him to be diligent in retaining counsel. If the defendant is in custody, his pretrial release conditions are determined.

A probable cause hearing is provided for; the State and the defendant are represented and evidence tending to establish probable cause is introduced. Certain technical reports by experts or technicians about tests performed are admissible at probable cause hearings. When there is *no serious contest*, reliable hearsay may be admitted to prove value, property ownership, lack of consent, and the existence or text of governmental ordinances and regulations. A probable cause hearing may not be held if the defendant has been indicted or if, after waiver of indictment, an information has been filed. The probable cause hearing may result in the defendant's being bound over to the superior court for trial, in setting the case for trial in district court, or in dismissal of the case. If bound over to the district court, the defendant (with the consent of the solicitor) may plead guilty or no contest. With the consent of both the solicitor and defendant, he may be tried immediately in the district court. Without the solicitor's consent, however, trial must be calendared in the district court not less than five working days nor more than 15 working days later.

● *Indictment and Related Procedures.* An article of the bill is devoted to indictment and related instruments and sets out in clear and

unequivocal terms the function and content of indictment, information, presentment, and the technique for waiver of indictment. Previous convictions, constituting a punishment-enhancing element of the offense charged, need not be brought to the attention of the jury—unless the defendant disputes his guilt of the previous offenses.

● *Speedy Trial.* The speedy trial article allows a judge to order that a defendant's case be disposed of within 30 days of the order. The judge may make the order if the defendant has been confined for longer than 60 days or has been awaiting trial, not in confinement, for longer than 90 days, or if the defendant requests speedy trial after 30 days of confinement or 60 days awaiting trial. Delays resulting from the defendant's actions, his absence, inability, or incapacity are excluded. Confinement does not include the period during which a defendant is on pretrial release. If the State fails to comply, the judge's order may prescribe either absolute discharge of the case or release of the defendant pending trial.

● *Securing Attendance for Trial.* The bill provides for securing attendance of defendants in institutions and notification to the clerk of a defendant-inmate's impending release. There is also a procedure to obtain defendants from federal prisons for trial.

The article on attendance of witnesses provides for material witness orders, which have the effect of detaining a witness until his testimony or deposition can be taken—but no longer than five working days even in an extraordinary case.

Voluntary protective custody can be used to protect a witness who desires the benefit of custody for his own safety. Anyone having custody of such a witness may not release him without his consent unless on court order.

● *Depositions.* Depositions are covered in detail in felony proceedings for those witnesses unable to be present because of physical or mental illness or infirmity or who will be absent from the state and beyond the jurisdiction of the court so long that they cannot appear at the trial. In taking depositions, the court may order payment of expenses for indigent defendants. The bill carefully limits the use of depositions at the trial to those instances when the witness is unable to be present or to testify because of: (1) death, illness, or infirmity; (2) absence beyond the jurisdiction of the court to compel appearance and the proponent of the witness' statement has exercised due diligence to secure the witness' attendance; or (3) a witness' persistent refusal to testify despite an order of the judge to do so. Depositions may be used to contradict or impeach.

● *Discovery.* One of the most far-reaching provisions of this proposal is the article on discovery in the superior court. Basically, the bill provides for voluntary discovery when possible and for court-ordered discovery on a reciprocal basis in other instances. Category by category, the state's right of discovery is conditioned upon the defendant's having sought discovery. Of course, certain items are exempted from the article such as reports, memoranda, and other internal work products of the solicitor, law enforcement officers, or State agents in investigation or prosecution of the case, or witness statements to agents of the State. The solicitor at any time may voluntarily disclose in the interests of justice.

In either voluntary or court-ordered discovery, each party has a continuing duty to disclose additional evidence or witnesses before trial.

Discovery may be restricted or denied or deferred by a written motion, examination *in camera*, and a finding of good cause. If denied or restricted, the material submitted *in camera* is sealed and preserved for appellate review.

● *Criminal Pleading, Joinder, Arraignment, Motions Practice.* Pleadings in criminal cases include the citation, criminal summons, warrant for arrest, statement of charges, information, and indictment, as is appropriate. The bill spells out the use and essential elements of each of the appropriate pleadings in both misdemeanor and more serious cases. The circumstances under which joinder of offenses and defendants may be made as well as the consequences of the failure to join are spelled out. The procedure for arraignment and a detailed motions practice article, including a lengthy list enumerating pretrial motions, are included. We set out the grounds for dismissal, change of venue, and special venire.

● *Notice of Defense of Alibi or Insanity.* The bill provides for advance notice to the State if a defendant intends to raise the defense of insanity. Upon written demand by the solicitor, a defendant intending to offer evidence of an alibi must file a notice before trial of his intent, including witnesses' names and details of his alibi. For good cause, of course, the court may grant an exception to this requirement.

● *Motion to Suppress Evidence.* The bill has carefully set out the procedure to suppress evidence and obliges the State to notify the defendant in writing of its intent to offer certain potentially suppressible evidence. This evidence includes statements of the defendant, evidence obtained without a search warrant, and any evidence obtained with a search warrant when the defendant was not present at the time of the search.

● *Defendant's Incapacity to Proceed.* The bill deals with a defendant's incapacity to proceed and spells out the procedures—including a hearing, appointment of medical experts, commitment to a hospital for a maximum of 60 days,

and temporary orders for the defendant's confinement and security in the interim.

To avoid the situation in which individuals are committed to a mental hospital to determine their mental incapacity and then are apparently forgotten, the clerk is required to keep a docket of defendants determined to be incapable of proceeding. Clerks must submit this docket to the senior resident superior court judge at least semiannually. This and related procedures insure that persons who regain capacity are promptly returned for trial or supplemental hearings. Charges against a defendant without capacity can be dismissed: (1) when the court determines that the defendant will not gain capacity, (2) when he has been deprived of his liberty for a period equal to or greater than the maximum confinement sentence for the crimes charged, or (3) after five years from the determination of incapacity in misdemeanor cases and after ten years in felony cases.

● *Pleas.* A defendant may plead guilty, not guilty, or no contest. A plea of no contest may be entered only with the consent of the solicitor and the presiding judge. Pleas may be received only from the defendant himself in open court, except in certain cases in which a written plea has been submitted.

A defendant may also plead guilty or no contest to other crimes with which he is charged in other districts. The district solicitor in the district where these other crimes are charged must be notified before the judge accepts the plea. That solicitor may appear or file an affidavit about evidence. As to the other crimes, the plea must be to the charge in the criminal pleading and not to a lesser or related offense.

A superior court has jurisdiction to accept a plea even though the case may otherwise be within the exclusive original jurisdiction of a district court. A district court, however, is limited to cases within its original jurisdiction.

The bill spells out in detail procedures relating to guilty pleas in superior court. It gives statutory sanction for plea arrangements relating to sentence, subject to the approval of the presiding judge. Likewise, the bill sanctions plea arrangements relating to the disposition of charges. In this instance, the judge must be informed of the arrangement but may not disapprove it. If the judge in a sentence-plea arrangement decides to impose a more severe sentence than that specified in the arrangement, he must tell the defendant and permit him to withdraw his plea. At that point, the defendant is entitled to a continuance until the next session of court. A verbatim record of proceedings of the plea arrangement must be made and transcribed — including the judge's advice to the defendant and inquiries and responses from the defendant, his counsel, and the solicitor.

● *Immunity.* Immunity may be granted to witnesses. We have opted in favor of "use" immunity, which is broader than the "transactional" immunity recently upheld as constitutional by the United States Supreme Court. Immunity could be granted in court proceedings after a witness declines to testify by asserting his privilege against self-incrimination. Immunity may be granted on application by the solicitor to the judge, after informing the Attorney General of the circumstances. Immunity may be granted to a witness before a grand jury. Charge reductions or sentence concessions may be granted in consideration of truthful testimony.

● *Grand Jury.* The commission recommends reducing the size of the grand jury from 18 to 16 persons. In addition, we have rewritten the grand jury article so that the grand jury is limited to the consideration of criminal conduct. The grand jurors retain some investigatory authority but in a much more limited context than may be the case now.

● *Miscellaneous Provisions.* We require that a list of jailed defendants be furnished to judges on the first day of criminal or mixed sessions.

We recommend repeal of the article on peace warrants and substitute in its place the substantive criminal offense of "communicating threats."

In an effort to compel appearance by defendants in motor vehicle cases, we provide for revocation of a driver's license seven days after the failure to appear. Revoking the right to drive can effectively compel appearances in motor vehicle cases. Revocation is rescinded immediately upon appearance. To assure the defendant's right to drive immediately after his appearance following revocation, the court may enter an order authorizing him to drive, a copy of which would be a temporary substitute for a driver's license.

We have examined Chapter 15 and related portions of other statutes in an effort to repeal only those that must be repealed in order to assure the effective implementation of the proposed act.

## Conclusion

We view this bill as a package. Most of the items and proposals were approved by more than a 2:1 vote of the diverse commission. Exceptions to this were the proposals on electronic surveillance and requiring advance notice of alibi defenses.

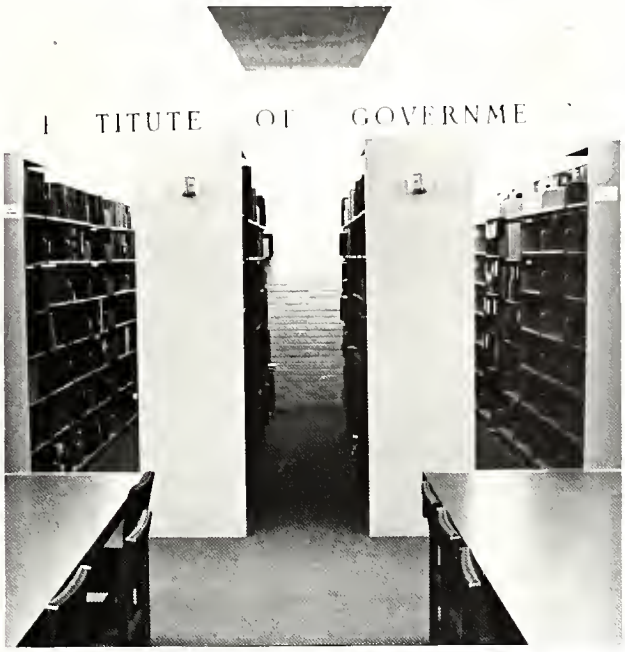
The Criminal Code Commission has labored long and productively to produce a pretrial criminal procedure law of which North Carolina can be proud. This bill constitutes a balanced approach to the administration of criminal justice and individual rights. The commission urges that all interested persons consider the bill as a whole. Your comments and criticisms are earnestly solicited.

# The Institute's New Library

Last November the Institute's library was moved to the ground floor directly beneath the auditorium of the Knapp Building so that library materials could be more centralized and larger and more comfortable work areas could be provided.

When the Institute moved to the Knapp Building in 1956, the library occupied only one room on the second floor. However, continued growth of the collection and library services gradually made more library space necessary.

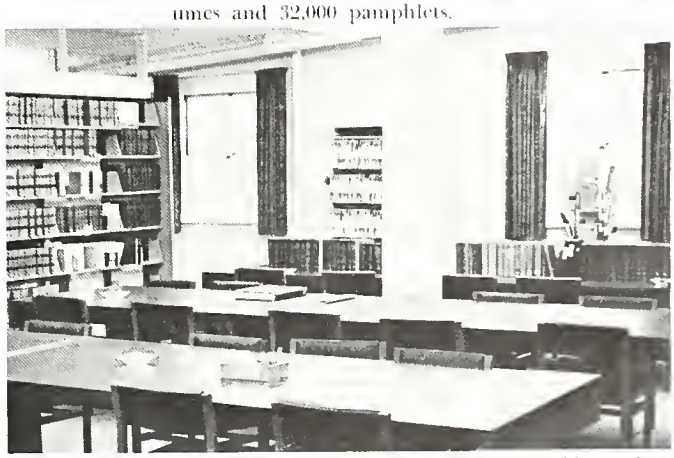
The collection, which consists of 14,500 volumes and a pamphlet collection of about 32,000 items of research materials, emphasizes coverage of state and local government and public law.




The Institute's library is now located on the ground floor directly beneath the auditorium.

The collection consists of 14,500 volumes and 32,000 pamphlets.

Librarian Becky Ballentine and library-assistant William Kennedy examine the video display terminal which gives information on legislative bill status during the General Assembly's sessions.



The new library provides larger and more comfortable work areas for library users.

# Comments at the Legislative Orientation Conference

Late in the fall (November 30-December 1), the Institute of Government and Governor Bob Scott sponsored a Legislative Orientation Conference for both freshmen and veteran legislators. Held before each legislative session, the conference is designed to familiarize legislators with procedures and important issues that are facing the General Assembly.

The first day of the conference was intended primarily for new legislators, covering legislative organizations and processes. The next day was devoted to the studies made by study commissions in the interim since the last session and to the recommendations that are now coming before the General Assembly.

Incoming Governor James Holshouser, incoming Lieutenant Governor Jim Hunt, and former Speaker Phil Godwin were among those who spoke at the conference. The remarks of the latter two appear below.

## I Comments: JIM HUNT

**DURING THIS LEGISLATIVE ORIENTATION CONFERENCE,** we will hear many issues that face us in the months ahead. We will hear the techniques for dealing with those issues. The agenda is filled with important items—topics that will help us in our daily tasks, valuable information about some of our major problem areas.

One of the most important areas for us to look at, to deal with, however, is not on the agenda. And yet, it is the one thing that all of our work revolves around—our ability to maintain the public's confidence in our actions as elected officials.

This problem deeply concerns me. I have become increasingly convinced that many people of our state simply don't trust the people they elect. They don't believe that the people govern themselves, that their voices and needs are heard by their elected leaders. They doubt the capacity of their government to respond to their needs rather than the needs of just the special interests.

When I was campaigning across this state, I encountered this feeling many times. And, my conversations with some legislators indicate that you have encountered it too.

I am not saying that the average citizen is totally bitter about his government. But some are. I am not saying that every citizen looks upon his government with distrust. But many do.

A recent newspaper article mentioned the findings of a Louis Harris poll. The article quoted him as saying, "Confidence of the public in the leaders of both public and private institutions in this country continues at a low ebb."

Harris listed sixteen major American institutions and said the leaders of none of them were regarded with a "great deal of confidence" by more than half of the people surveyed. Leaders of the judicial, executive, and legislative branches of the federal government ranked ninth, tenth, and twelfth, respectively, in that list of sixteen. They ranked behind leaders

in such fields as medicine, finance, science, religion, psychiatry, and retail business. This was a national survey, but I tend to think its results can be applied with equal validity to state government.

**MUCH REMAINS TO BE DONE** in North Carolina. We have many problems to solve. We face years of challenges and exciting opportunities.

If we are to deal effectively with our problems, if we are to face our challenges and meet them squarely, we must first work to restore faith in our governmental process itself and in the officials that control it.

This should be our primary goal.

We must all work to make our government and our political system itself more responsive to the needs of the people. I believe that our legislative branch has the greatest opportunity of all to really do something about this problem.

What are some of the immediate steps that can be taken?

First, we must make sure that our committees can consider fully and fairly the legislation placed before them. One way this can be done is by considering their composition. We must see to it that legislative committees fairly represent the people of our state and are not stacked, or weighted, in favor of special interests.

I think we can continue to rely heavily on the expertise of the members of the legislature—for their interest and knowledge in specific areas is a valuable asset for any governing body to have—and we can still assure that we do not have a banking committee composed entirely of bankers or an insurance committee composed entirely of insurance men or lawyers.

Many of you have expressed your strong feelings on this subject, and I agree wholeheartedly that on each committee there should be members who reflect the interest of the public as a whole. This is one way that we can strengthen the "public interest" in what we do.

A second way that we can deal with the problem of actual and apparent conflicts of interest in state government is by passing an effective ethics law.

Again, many of you have said that you are ready to support such a law. I believe the people, in general, want such a law and that they are entitled to have it.

I outlined one concept of such a law in a speech some weeks ago. It would apply to all our public officials—not just elected officials but appointed officials and even those hired and paid with our tax money. It would cover all branches of North Carolina state government. It would prohibit the use of an official position or office for personal gain. It would spell out how conflicts of interest could be avoided and would let us know when conflicts of interest existed. It would provide for disclosure of financial status, and it would restrict people from serving in areas of state government—on regulatory boards, for example—in which they have a vested interest (unless they were specifically allowed to do so by law).

*Lieutenant Governor Jim Hunt*

**IN ANOTHER CLOSELY RELATED AREA,** we can restore some of the lost confidence in our public officials by restoring confidence in the election process itself.

Many people today feel that money weighs too heavily on the ballot box. We need some reasonable limits on the amount of money that can be spent in our state campaigns.

A federal law imposes limits on elections for federal office. I suggest that we follow the same pattern here—not the same limits but the same concept.

We should also limit the amount of money that a single contributor can make to a campaign; all too often, many people feel that contributions are made now in return for favors later.

Strong ethics and campaign-financing laws will do much to restore the image of honest officials—honestly elected and honestly serving.

**A THIRD AREA** in which we can take effective action to bolster public confidence is again in the legislature itself. When the United States House of Representatives convenes its next session, the members will cast their votes electronically. I believe that it is time to adopt this method in North Carolina. We are prepared to do so, and it is appropriate for us to do so. I believe that the people want us to do so.

*Governor James Holshouser addressed the legislators at the conference banquet.*

By the regular recording of votes, we can show the people of our state that there is "nothing to hide" in the laws that are passed. Electronic voting would facilitate this.

We also can assure that our actions and deeds are as open to the scrutiny of the public as we possibly can make them.

During the last session, an open-meetings law was enacted that, I am told, is working reasonably effectively. I think we should always remember the spirit of that law.

**FINALLY, I THINK THE LEGISLATURE** can improve its own method of operation. There is great sentiment now for annual sessions of short duration, which would enable us to deal more effectively with the changing problems of our state. As we move in this direction, we should examine our legislative structure itself to see how it can best deal with this important change.

I would like, for instance, to see us strengthen our committee system—pare it down if we can, give it adequate staff support, let it function on a continuous basis to take the initiative in developing the complex legislation of our time.

By improving our ability to perform, we can build public confidence in our actions. If the people know that the laws that are enacted have been given a full, fair, and open consideration—with all of the facts available and with the decisions made solely on merit—we will have gone a long way toward building that confidence.

I urge the General Assembly to take the lead in these areas. You, more than anyone else, can play the key role in restoring the people's confidence in their government.

We face years of challenges and exciting opportunities. By improving our governmental process itself, we will be well on our way to meeting them.

North Carolina is a state endowed with great and good things. We have fertile land, clean air, a growing economy. But perhaps the most important of our assets is the people who live here. For the most part, they are good people, honest people who have worked hard for what they have and share their blessings with one another.

I am most concerned that, as we go about our governmental tasks, we live up to the trust that they have placed in us as public officials. We owe these people the best that we can give. We owe them an honest, efficient, and effective government that can truly respond to them and to their needs.

# II Comments: PHIL GODWIN

**THE GREATEST TASK** that I faced when I became Speaker of the House was appointing committee members. Those who have served in the General Assembly realize that the heart of the General Assembly lies in the committee, and it is the presiding officer's duty and responsibility to appoint committees so that the General Assembly can get the most benefit from the different interests and talents of the legislators. I firmly believe that it is not the number of committees you serve on but the job you do that is important. With this in mind while presiding officer, I tried to limit the number of committees on which each member served to about seven. I also tried to follow, as closely as possible, the legislators' preferences about committee assignments.

The presiding officer also must attain an equitable geographic representation on committees. To be perfectly frank, he has to be careful in regard to the special interests that individual legislators might have.

When you receive committee assignments, you should get to know your chairmen and the bills that are assigned to your particular committees. Do your homework before a committee meets and do not be afraid to ask questions if you have thought about them and are not merely trying to impress other members of the committee or the press.

Sometimes different committee meetings will conflict. You should determine what bills will be considered in each committee. If a bill you are vitally interested in is coming up at a time that conflicts with another meeting, if you contact the chairman of the committee, it's likely that he can postpone the consideration of that bill until you can be present. The importance of working with and through the chairmen of your committees just cannot be overstated.

**MOST OF YOU WILL COME** to the legislature with your own ideas about legislation and with requests by your county and city governments and by other interested citizens. However, you can make a mistake by hurrying to introduce a bill. First, you should see whether there is a need for the legislation you propose; in other words, you should determine whether the law is already on the books.

When you have formulated an idea for a bill and discussed it with the bill drafter and the draft has been made, you should thoroughly review the bill before introducing it. The author of the bill must see that it is grammatically correct and says what he wants.

If the bill is local, alert the senator who represents your district so that he can watch for it to reach the Senate. Never forget that a bill must pass both houses.

If you feel that certain legislation deserves the attention of a particular committee, confer with the presiding officer before the bill is introduced. This does not mean that he will always refer the bill to the committee you suggest, but unless you tell him, he has no way of knowing your wishes.

When the bill is under committee consideration, be prepared to explain it briefly but intelligently before the committee (whether a Senate or House committee). Know what you are talking about. Be able to answer questions. Be brief and concise. Sponsors sometimes talk their bills to death.

If you know that a bill has opposition, talk to your opposition before the bill reaches the floor. Little misunderstandings about a particular bill can often be straightened out. You might have to compromise, but compromise is usually better than defeat.

Fellow members may sometimes ask whether you want to sign a "good bill." Don't sign any bill unless you know its complete content and ramifications. You will never be rated by the number of bills you sign; in fact, people in your district will probably never know how many bills your name appears on. However, if you make one mistake, however innocent, I assure you that they will know about it. The theory is that if many members sign a bill, the chances of its passage are better. To me, this isn't necessarily so.

**YOU SHOULD ACQUIRE** a calendar of each day's proceedings and find out what bills will be discussed. Don't wait until you arrive in the chamber to see what is on the calendar. If you do not understand a bill that is on the calendar, go to the introducer and ask for his personal explanation. Doing so will save him floor time when the bill comes up. Again, do not be afraid to ask questions and debate bills, but only if you have done your homework. The General Assembly is no place to play to the press and cameras.

If you have special problems concerning legislation, consult the presiding officer. He will always be willing to assist and advise you.

The presiding officer has a better opportunity than the membership to observe the decorum of the body. The gallery gets an even better view. The members of the North Carolina General Assembly have a responsible position to fulfill, and it should not be taken lightly. Be on time. If you are prepared and know what you are talking about, you will cut days off the end of the session. The Rules Committee of each body of course makes its own rules about conduct and general decorum, but I sincerely believe that smoking, drinking, and eating on the floor of either body is not attractive to observers.

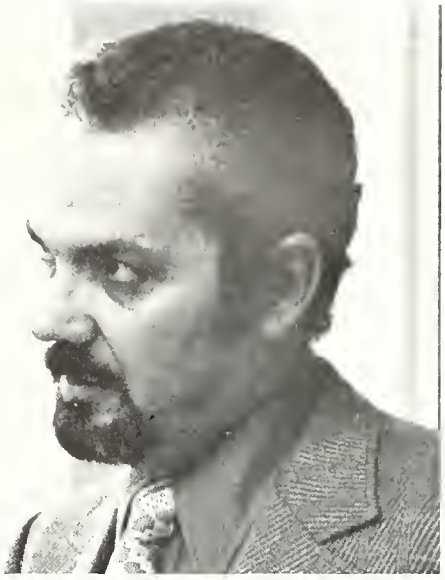
**MANY CHANGES** have been made in the General Assembly since my first service, and all of them have been directed to providing better tools for the legislator. The Legislative Services Officer and his staff have done an outstanding job in providing services. This year the Fiscal Research Officer will be staffed, and he and his staff will render valuable services. We must continue to upgrade these services and make the position of legislator as important as it should be.

Now is the time to give serious consideration to annual sessions of the legislature, to standing committees, and to annual budgeting, which might eliminate some of the guesswork of second-year budgeting.

Government is just like any other business. If we expect to get talented individuals to make our laws, we must offer salaries that will make it possible for them to serve. The pay of the members of the General Assembly should be upgraded. The matter of legislative retirement should be considered, and either it should be put on an equitable basis like that of any other state employee or we should see how other states pay their legislative retirement.

The time has come when the North Carolina General Assembly can no longer play the strong hand of partisan politics. We must look to the capabilities of individuals and work together as a General Assembly providing services for the betterment of our great state.

# *People at the Institute*



# Is The Press Being Hobbled?

**Sam J. Ervin, Jr.**

Comments before the North Carolina Press Association on January 19, 1973

IT IS MY BELIEF that the First Amendment was adopted by our Founding Fathers for two basic reasons. One reason was to insure that Americans would be politically, intellectually, and spiritually free. The other was to make certain that our system of government, a system designed to be responsive to the will of an informed public, would function effectively.

The scope of First Amendment freedoms, including freedom of press, is broad and was intended to be so. The First Amendment is impartial and inclusive. It bestows its freedoms on all persons within our land, regardless of whether they are wise or foolish, learned or ignorant, profound or shallow, and regardless of whether they love or hate our country and its institutions.

For this reason, of course, First Amendment freedoms are often grossly abused. Society is sorely tempted at times to demand or countenance their curtailment by government to prevent abuse. Our country must steadfastly spurn this temptation if it is to remain the land of the free. This is so because the only way to prevent the abuse of freedom is to abolish freedom.

The quest for the truth that makes men free is not easy. As John Charles McNeil, a North Carolina poet, said, "teasing truth a thousand faces claims as in a broken mirror." The Founding Fathers believed—and I think rightly—that the best test of truth is its ability to get itself accepted when conflicting ideas compete for the minds of men.

And, so, the Founding Fathers staked the very existence of America as a free society upon their faith that it has nothing to fear from the exercise of First Amendment freedoms, no matter how much they may be abused, as long as truth is free to combat error.

Representatives of the press have been recently claiming that they are not free, that in effect the Nixon administration has shackled them with threats and restrictions that do not permit them to fulfill the role that the Constitution gives them. There is substance, I feel, to their claims. *Newsweek* magazine goes so far as to say that the recent clashes between the administration and the media are "without precedent in the history of the United States."

To some, this may be overstating the significance of the conflict. The press has typically played a critical role of government, and government has often responded with intemperate condemnation or simply with charges of irresponsibility. I cannot say that such responses have always been unjustified.

But the actions of the present administration appear to go beyond simple reactions to incidents of irresponsible or biased reporting to efforts at wholesale intimidation of the press and broadcast media.

I point to a few examples.

Recently, we saw Clay Whitehead, director of the White House office of Telecommunications Policy, explaining a new administration proposal that would condition the renewal of broadcast licenses by the FCC on whether the local station management is "substantially attuned to the needs and interests of the communities he

serves." He later made clear that what was really sought was control of network news: "Station managers and network officials," he said, "who fail to act to correct imbalance or consistent bias from the networks—or who acquiesce by silence — can only be considered willing participants, to be held fully accountable by the broadcaster's community at license renewal time."

In a rather interesting sidelight that indicates how this plan might work, it was recently reported that the finance chairman of Mr. Nixon's campaign in Florida, George Champion, Jr., has challenged the license of WJXT in Jacksonville. WJXT was the station whose reporters discovered some controversial statements of Nixon Supreme Court nominee G. Harold Carswell, which contributed to his failure to receive Senate confirmation. To make matters worse, the station is owned by the *Washington Post,* which is a frequent administration critic.

We also see significant inroads being made into public broadcasting. Under administration pressure, funds for the Public Broadcasting Corporation, which in turn provides funds for the Public Broadcasting Service, were slashed in the last Congress. As a result, the corporation board, a majority of which are administration appointees, has decided to withhold funds, but only for certain public affairs programming that had often included comment critical to the Executive. Programs such as William Buckley's "Firing Line," "The Advocates," "Bill Moyer's Journal," "Wall Street Week," and "Washington Week in Review" will not be seen after this season unless the corporation agrees to release these funds.

It was the intent of the Congress in enacting the Public Broadcasting Act of 1967, which created an intermediary corporation to receive funds for public television, to insulate control of programming from those who appropriated the dollars for it. It now appears that the intermediate agency is asserting the sort of political control that the Congress wisely denied itself.

There are other examples of administration intimidation that come to mind: the early speeches of the Vice President harshly criticizing the press; the investigation of CBS newsman Daniel Schorr, who had been critical of the administration in 1971; the recent exclusion of the *Washington Post,* particularly critical of the President's war policies, from coverage of White House social events; and, of course, the controversial Pentagon Papers case, which, whatever one may think of the circumstances, was the first time that the government sought to enjoin the publication of a news story.

How many editorials have not been written, or critical comments not made, because of these incidents is not something that can easily be proved. I do recall the "instant analyses" that followed presidential addresses. Following considerable administration objection, we no longer have them. Decisions not to criticize are decisions that people keep to themselves. But the fact that intimidation cannot often be readily shown does not mean it is not present.

SO WE COME to what was the announced subject of my presentation: the newsmen's privilege proposals. I wanted to give you this background because I believe that the threat of a subpoena to testify before a governmental tribunal is yet another means of governmental intimidation of the press. A newsman who publishes a story obtained from confidential sources that is critical or accusatory of public officials or programs now faces the threat of subpoena and a possible jail sentence if he refuses to reveal his source. If he decides to back off a controversial story, it is the public that has lost information that could lead to political and social improvement.

The administration's stance with regard to a statutory testimonial privilege has been one of rather passive resistance. Assistant Attorney General Roger Cramton, testifying before a House committee last fall, said that while the administration favored a qualified privilege in principle, it felt that such a privilege was unnecessary. He furthermore endorsed the Supreme Court's ruling in last June's *Caldwell* decision that the First Amendment's guarantee of a free press does not entitle newsmen to refuse to reveal confidential sources of information.

I myself criticized the *Caldwell* opinion as failing to take into account the practical effect of such a ruling upon reporters and their sources of information. If sources of information cannot be assured of anonymity, chances are they will not come forward. If the reporter is willing to assure confidentiality, he must accept the fact that he may have to serve a jail sentence in order to fulfill his promise. It is rather ironic, I think, that the reporters themselves are the ones who ultimately are jailed for refusal to reveal sources of stories that the public would never have been aware of had not the reporter himself decided to publish.

An example recently came to my attention which I feel illustrates the necessity for some type of privilege. It involves a reporter for the *Memphis Commercial Appeal* in Memphis, Tennessee — Joseph Weiler. An informant had contacted the paper with the information that children confined to the state-owned hospital for the mentally retarded in Memphis were being beaten and otherwise mistreated by supervisory personnel. After some investigating, Mr. Weiler wrote a story that corroborated these reports. An investigation by a committee of the state senate ensued, but curiously enough, the focus was upon who the state employee was who tipped off the newspaper rather than upon the charges themselves. Mr. Weiler was sub-

poenaed and requested to bring whatever notes and correspondence he had concerning the case. He appeared before the committee but refused to identify his source. He was unanimously cited for contempt of the committee.

I submit to you that the losers here are not Mr. Weiler and his newspaper, but rather the people of Tennessee whose tax dollars support that institution and the children of that hospital who are helpless to improve their lot.

It is this sort of case—in which confidential information leads to the discovery of flaws and shortcomings in our social and political processes—that makes the passage of some type of statutory privilege particularly compelling. Without the protection of anonymity, inside sources may simply "dry up." The stories will not be written. We all will be the losers. And nobody—culprit or reporter—will go to jail.

I am aware of the criticism that has been leveled at these proposals. A testimonial privilege will act as a shield behind which biased, or otherwise irresponsible, reporters will hide. Newsmen will be able to criticize unjustly and not be held accountable for it. I would answer by first having you note that most of the proposals creating a newsman's privilege now provide that a newsman may not claim the privilege in a suit for defamation, which includes libel and slander. This means that the protection that we now have against irresponsible reporting — namely, a civil suit for defamation—would retain its vitality as a check.

Undoubtedly there are legitimate interests to be served by having newsmen testify as other citizens do. Certainly it is desirable to have all the evidence possible before a court when a man's freedom or livelihood is at stake or when society attempts to identify and punish an offender. The newsmen's privilege, like any testimonial privilege, must necessarily impede this search for truth to a degree. The question is whether, considering the effects on the flow of information to the public, the impediment is worth the benefit; and if so, can the bill be drafted to accommodate the competing interests.

THERE ARE NOW three newsmen's privilege bills and one resolution pending in the Senate and a multitude of bills introduced in the House. The Subcommittee on Constitutional Rights will hold hearings on the subject beginning February 20.

The bills all concern themselves with four basic questions: First, should the privilege be a qualified or an absolute one. Those that provide a qualified privilege attempt to set standards that must be met by the person seeking the newsman's testimony in order for the privilege to be divested. The qualifications in all of the proposals, although differing in specifics, are intended to reconcile the competing interests involved. Those favoring an absolute privilege argue that it is impossible to accommodate the competing interests without critically limiting the newsmen's protection.

The second question is whether the privilege should apply only to federal tribunals or also to the states. While it is true that many of the recent cases involving a newsman's privilege have come before state tribunals, one also must realize that to make the privilege applicable to the states, the Congress will be legislating a rule of evidence for use in state courts, and this would be an intrusion into an area of state responsibility that the Congress has not engaged in previously. It raises serious problems of federalism. No one, certainly not Congress, can assert an exclusive claim on wisdom. Here, as in so many cases, it is highly important to let all states make their own judgment on the balance of interests involved.

A third area addressed by these proposals is the matter of who is a newsman? Who should be entitled to claim the privilege? The First Amendment applies to all citizens and protects their right to publish information for the public. But the testimonial privilege of course cannot be available for all. Thus, a serious problem of definition is posed. The privilege must be broad enough to offer protection to those responsible for news reporting, and yet not so broad as to shield the occasional writer from his responsibility as a citizen. Any attempt at defining the scope of the privilege is in effect a limitation on the First Amendment. It will confer First Amendment protection on some who deserve it and deny it to others with powerful claims to its mantle. Do we include scholars as well as reporters? The weekly and monthly press as well as the daily? Free lance or just the regularly employed? TV cameramen? Underground papers? The radical press?

So difficult is this question that I would much have preferred the Supreme Court to adopt the wise and balanced approach of the Ninth Circuit in *Caldwell*. Some of these issues, if not the whole question of the newsmen's privilege, would be better left to a case-by-case development in the courts. Unfortunately that avenue is now closed for all practical purposes, and Congress must attempt to be as wise as the drafters of the First Amendment 200 years ago.

Finally, there is the question of the procedural mechanism through which the privilege is claimed. As is often the case, the effectiveness of the substantive provisions may well depend on how they are employed. In the case of the newsman, should the party who is seeking his testimony be required to show before a subpoena is issued that the newsman is not entitled to protection under the statute? Should the newsman be required to answer a subpoena before he can claim the protection of the statute? And, if so, should he have the burden of showing that he is entitled to protection or should the

party seeking the testimony have the burden of proving he is not entitled? The means by which the privilege is claimed or divested may, for all practical purposes, determine its effectiveness.

These then are the basic questions facing the Congress with respect to this legislation. The Subcommittee on Constitutional Rights, as I have mentioned, will receive testimony on the proposals during the last two weeks in February, and I am hopeful that the Subcommittee will be able to report some sort of bill favorably shortly thereafter.

A free press is vital to the democratic process. A press that is not free to gather news without threat of ultimate incarceration cannot play its role meaningfully. The people as a whole must suffer. For to make thoughtful and efficacious decisions — whether at the local school board meeting or in the voting booth—the people need information. If the sources of that information are limited to official spokesmen within government bodies, the people have no means of evaluating the worth of their promises and assurances. The search for truth among competing ideas, which the First Amendment contemplates, would become a matter of reading official news releases. It is the responsibility of the press to insure that competing views are presented, and it is our responsibility as citizens to object to actions of the government that prevent the press from fulfilling this constitutional role.

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