

**SENATOR
SAM ERVIN
SAYS**



Thomas Jefferson wrote in 1787: "The basis of our government being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter."

The Founding Fathers, of course, decided that we should have both government and newspapers. Ever since then we have time and again sought to reconcile asserted government necessity—warranted or not—to the demands of the First Amendment. Now we again find ourselves attempting to define the relationship between these two essential components of our society. Specifically, the issue is whether government should be permitted to compel the press to reveal confidential sources of information or the content of unpublished information. In recent days, this has been the subject of hearings before the Senate Subcommittee on Constitutional Rights, of which I am Chairman. I have previously discussed some of the points involved in our deliberations, and should like to pursue this matter further by raising the major views at stake.

First, should newsmen's testimonial privilege be qualified or absolute? Or, should it be absolute in some forums and qualified in others? The Subcommittee has before it a number of bills and one joint resolution which provide some type of statutory protection for newsmen. Those bills which provide a qualified privilege attempt to set standards which must be met by the party seeking the information before the newsmen is required to divulge sources or confidential information. While differing in specific qualification, these bills all attempt to reconcile the interests in the administration of justice with the free flow of information. Those favoring an absolute privilege argue that it

is impossible to accommodate the competing interest without critically limiting the newsmen's protection.

The second question is whether the privilege should apply only to federal tribunals or to the states as well. Most of the cases involving newsmen subpoenas have taken place in state courts, but there is reluctance on the part of many to Federally establish such a privilege for the states.

A third question arises as to who is a newsmen. 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 can, of course, not be available for all. Thus, a serious problem of definition is posed. It must be broad enough to offer protection to those responsible for news

reporting, and yet not so broad to shield the occasional writer from his responsibility as a citizen.

A fourth question develops over whether the protection should extend only to the identity of confidential sources, or should it include unpublished confidential information. With the protection of confidential sources, we are concerned with the identity of informants. As to unpublished information, it is the integrity of the newsmen that is at stake. Separate policy considerations underlie these categories.

A fifth question concerns the procedural mechanism for asserting or divesting the privilege. As is often the case, the effectiveness of the substantive provisions may well depend on the method by which they are employed. For example, if a newsmen is issued a subpoena he has the choice of either moving to quash the subpoena or appearing at the

proceeding. If he appears at the proceeding and is asked a question relating to confidential material, he may object. A better solution from the point of view of the newsmen would be to have the burden of showing that he is not entitled to the protection of the statutory privilege rest with the party seeking the information. The proposed bills differ on the procedural mechanism which decides how the newsmen is entitled to assert his protection.

Critics urge that in a libel suit in which a newsmen is a defendant and where the defense is based on the truth of what he has written that a newsmen should not be allowed to hide behind the privilege and refuse to identify the source or information upon which he was relying.

These are some of the complexities of drafting legislation applicable to the newsmen's privilege.

Finally, there is the issue of the applicability of the privilege to libel and other civil suits.

Each person is born to one possession which outvalues all the others, his last breath.—Mark Twain.

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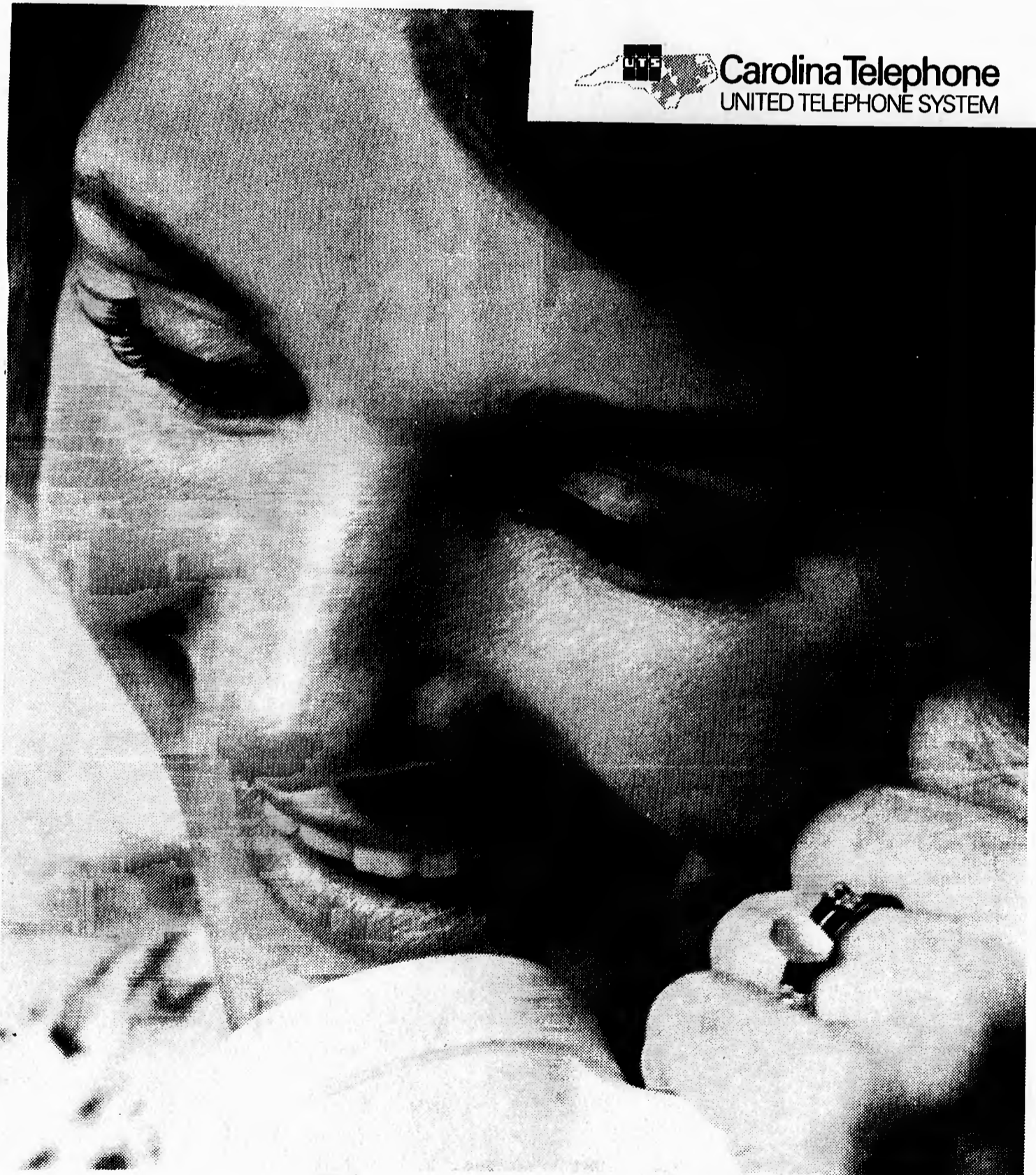
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