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A Newsman's Privilege - The First Amendment

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A NEWSMAN'S PRIVILEGE—THE FIRST AMENDMENT*

A Black news reporter for the *New York Times*, specializing in reporting on the Black Panther Party, was served a subpoena to appear and testify before the Grand Jury of the United States District Court for the Northern District of California.[1] The grand jury was engaged in a *general* investigation of the Black Panther Party to determine the possibility of its involvement in criminal activities contrary to federal law.[2] After protesting the scope of the subpoena, the reporter was served a second subpoena which required only his attendance before the grand jury.[3] The court denied the reporter's motion to quash both subpoenas and directed compliance with the second subpoena subject to a protective order.[4]

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* This note is directed primarily to an analysis of the first amendment issues involved in the instant case. Grand jury functions, incorporation of prior grand jury activity, and the effect of the expiration of a grand jury term are not within the scope of this note.

1. On February 2, 1970, Earl Caldwell was served with a subpoena directing him to appear before the grand jury accompanied by certain papers. The papers included all notes and tape recordings of interviews covering more than a one-year period which reflected statements made by officials of the Black Panther Party pertaining to the aims and purposes of said organization, and the activities of the organization, its officers, staff, personnel, and members, including specifically, but not limited to, interviews given by David Hilliard and Raymond "Masai" Hewitt. Brief of The American Civil Liberties Union, as Amici Curiae at 3, Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970).

The power of the Grand Jury and the United States Supreme Court position has been summarized as follows:

> [I]t is clearly recognized that the giving of testimony and the attendance upon court or *grand jury* in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned, and for performance of which he is entitled to no further compensation than that which the statutes provide. The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public.

Blair v. United States, 250 U.S. 273, 281 (1919).

2. The *general* nature of the investigation being conducted by the grand jury is significant because the vast scope of the investigation limits the applicability of the decision. The major thrust of the opinion, however, was a realization that newsmen have a need for confidential sources of information and that certain conduct abridges first amendment rights. The disclosure of the source of information may discourage the participation of those desiring to remain anonymous and deny a dissident group access to the press, deny the newsmen access to newsworthy material, and prevent the public from receiving uninhibited views. *See, e.g.*, McCray v. Illinois, 386 U.S. 300 (1967); Roviaro v. United States, 353 U.S. 53 (1957) (police-informant). *See also* N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958).

3. This is the basis for the reporter's contention that the forced appearance would cause the loss of his sources of information. This additional subpoena *ad testificandum* was served on March 16, 1970, with the government subsequently withdrawing the subpoena of February 2, 1970. Brief of The American Civil Liberties Union as Amici Curiae at 3, Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970).

4. The protective order issued by the District Court provided:

> (1) That . . . he shall not be required to reveal confidential associations, sources or information received, developed or maintained by him as a professional journalist in the course of his efforts to gather news for dissemination to the public through the press or other news media.
> (2) That specifically, without limiting paragraph (1), Mr. Caldwell shall not be required to answer questions concerning statements made to him or information given to him by members of the Black Panther Party unless such statements or information were given to him for publication or public disclosure.
> (3) That, to assure the effectuation of this order, Mr. Caldwell shall be permitted to

Thereafter, the reporter filed a notice of appeal, which the Government contested as interlocutory.[5] The Government's motion to dismiss was granted without opinion. The term of the grand jury having expired, the reporter was served a new subpoena.[6] The reporter again moved to quash the subpoena. The court denied the motion to quash and expressly directed the reporter to appear before the grand jury with the shield of the protective order. The reporter, claiming constitutional protection, refused to obey the court order and was held in contempt.[7] On appeal to the United States Court of Appeals for the Ninth Circuit, *held*, reversed and remanded: Where it is shown that the public's first amendment right to be informed would be jeopardized by requiring a journalist to submit to secret grand jury interrogation, the government must demonstrate a compelling need for the witness' presence before the judicial process properly can issue to require attendance. *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970).[8]

Every reported case[9] prior to *Caldwell* has held that, absent a statutory privilege,[10] a news reporter, subpoenaed to appear in a judicial pro-

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consult with his counsel at any time he wishes during the course of his appearance before the grand jury . . . .

Caldwell v. United States, 434 F.2d 1081, 1082-83 (9th Cir. 1970).

5. *Compare* 28 U.S.C. § 1291 (1964) *with* 28 U.S.C. § 1292 (1964).

6. The subpoena *ad testificandum* was served on May 22, 1970. All proceedings had in connection with the earlier subpoenas were incorporated into the record of the proceedings concerning this last subpoena. A new order directing attendance was issued containing the previous protective provisions.

7. On May 22, 1970, Caldwell refused to appear before the grand jury and a show cause order was issued on the same day. On June 5, 1970, he appeared in court and again refused to testify.

8. The court limited its holding thusly:

> We go no further than to announce this general rule. As we noted at the outset, this is a case of first impression. The courts can learn much about the problems in this area as they gain more experience in dealing with them. For the present we lack the omniscience to spell out the details of the Government's burden or the type of proceeding that would accommodate efforts to meet that burden. The fashioning of specific rules and procedures appropriate to the particular case can better be left to the District Court under its retained jurisdiction. . . .
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> Finally we wish to emphasize what must already be clear: the rule of this case is a narrow one.

Caldwell v. United States, 434 F.2d at 1089-90 (9th Cir. 1970).

9. *See, e.g.*, People *ex rel.* Mooney v. Sheriff, 269 N.Y. 291, 199 N.E. 415 (1956) (the leading decision in this country on the issue involved in the case noted herein); Brewster v. Boston Herald-Traveler Corp., 20 F.R.D. 416 (D.C. Mass. 1957); Annot., 7 A.L.R.3d 591 (1970); Guest and Stanzler, *The Constitutional Argument for Newsmen Concealing their Sources*, 64 NW. U.L. REV. 18 (1969). *See also*, Beaver, *The Newsman's Code—The Claim of Privilege and Everyman's Right to Evidence*, 47 ORE. L. REV. 243 (1968); Note, *Privileged Communications—News Media—A "Shield Statute For Oregon"*, 46 ORE. L. REV. 99 (1966).

10. The following state statutes, as they appear in Guest and Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NW. U.L. REV. 18 (1969), have been enacted to obtain the desired result: ALA. CODE RECOMPILED tit. 7, § 370 (1960); ARIZ. REV. STAT. ANN. § 12-2237 (Supp. 1969); ARK. STAT. ANN. § 43-917 (1964); CAL. EVID. CODE ANN. § 1070 (West 1966); IND. ANN. STAT. § 2-1733 (1968); KY. REV. STAT. § 421.100 (1962); LA. REV. STAT. §§ 45:1451-54 (Cum. Supp. 1969); MD. ANN. CODE art. 35, § 2 (1965); MICH. STAT. ANN. § 28.945(1) (1954); MONT. REV. CODE ANN. tit. 93, ch. 601-2 (1964); N.J. STAT. ANN. § 2A:84A-21,-29 (Supp. 1969); OHIO REV. CODE ANN. § 2739.12

ceeding[11] has neither a common law evidentiary privilege,[12] nor a constitutional right, to withhold the names of confidential sources and/or information obtained therefrom. In particular, an interpretation of the first amendment[13] to afford a newsman[14] the right to withhold the names of confidential sources or the information received therefrom has been examined and expressly rejected.[15] In each case, the courts have directly or indirectly noted that the fair administration of justice is hindered by an extension of first amendment rights.[16]

(1964); PA. STAT. ANN. tit. 28, § 330 (1958). The first such statute was enacted in Maryland in 1896. Federal legislation has also been suggested in this area but has met with little or no success. *See* S.R. 1851, 88th Cong., 1st Sess. (1963); H.R. 8519, 88th Cong., 1st Sess. (1963); H.R. 778, 88th Cong., 1st Sess. (1963). *See* compilation of related material in Guest and Stanzler, *supra* at 20, 21.

11. These proceedings include both civil and criminal actions and cover the discovery process and grand jury investigations. *See, e.g.*, the cases cited in notes 9 *supra* and 15 *infra*.

12. The nature of the privilege asserted is similar to that of the police-informant privilege. McCray v. Illinois, 386 U.S. 300 (1967); Roviaro v. United States, 353 U.S. 53 (1957). The newsman is the person asserting the privilege to protect both his source and the public's right to information through the use of such concept. This differs from the traditional common-law privileges, i.e., attorney-client, doctor-patient, in that the newsman may, at his discretion, violate the privileged relationship by disclosing certain informaton when it may be beneficial for him to do so. The public and the source of information will not be protected if the newsman considers it in his best interest to breach the confidence.

13. U.S. CONST. amend. I, "Freedom of the Press" provision. The inclusion of a newsman's privilege in the first amendment absent any express language, would make the first amendment fully operable as does the "exclusionary rule" in situations of illegal search and seizure under the fourth amendment. Although this analogy is somewhat strained, the basic concept of interpretation to create a restraint on conduct that is contrary to the essence of a free society, absent express constitutional language to that effect is present in both situations. Both concepts make fundamental rights fully operative.

14. The reporter is the person who directly receives the protection. *See* note 10 *supra*. Any suggestion that newsmen, as an occupational group, inherently possess rights beyond those of other citizens is untenable.

> [I]t would be difficult to rationalize a rule that would create special constitutional rights for those possessing credentials as newsgatherers which would not conflict with the equal protection concepts also found in the Constitution.

State v. Buchanan, 250 Ore. 244, 248, 436 P.2d 729, 731 (1968).

15. Garland v. Torre, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958); Murphy v. Colorado, 356 U.S. 843 (1961) (*cert. denied*); *In re* Goodfader's Appeal, 45 Hawaii 317, 367 P.2d 472 (1961); *In re* Taylor, 412 Pa. 32, 193 A.2d 181 (1963); State v. Buchanan, 250 Ore. 244, 436 P.2d 729, *cert. denied*, 392 U.S. 905 (1968). The United States Supreme Court has avoided considering the point by denying certiorari each time the question has been presented. In Burdick v. United States, 236 U.S. 79 (1915), the Supreme Court upheld the right of an editor to refuse to disclose the source of certain information. The decision, however, was based on the fifth amendment (self-incrimination), not the first amendment as presented in the instant case.

16. *See, e.g.*, Garland v. Torre, 259 F.2d 545, 549 (2d Cir. 1958):

> If an additional First Amendment liberty—the freedom of the press—is here involved, we do not hesitate to conclude that it too must give place under the Constitution to a paramount public interest in the fair administration of justice.

Cf. Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941) (dissenting opinion); Chambers v. Baltimore & Ohio R. Co., 207 U.S. 142 (1907); Patterson v. Colorado *ex rel.* Attorney General, 205 U.S. 454 (1907). These decisions relate to the functions of the judicial process and the application of the freedom of the press therein.

Initially, the court in *Caldwell* had to determine whether the first amendment could be interpreted to afford a newsman the right to withhold information to insure freedom of the press;[17] and, if so, whether the first amendment required more than the protective order issued by the district court.[18] The reporter maintained that the inevitable effect[19] of the subpoena would be a suppression of vital first amendment freedoms by driving a wedge of distrust and silence between the news media and the Black Panthers.[20] The government factually contested this view, stating that the Black Panthers actually *depend* on the mass media to maintain themselves in the public eye and thus use the media to gain public support.[21] As the court stated, the government's position was not responsive to the first amendment argument. The first amendment envisions the widest possible distribution of information from, and to, diverse sources.[22]

Courts have long recognized that the mere journalistic classification of material as "news" warrants no special constitutional treatment.[23] Rather, the essence of constitutional protection for written work revolves around the publication or other public dissemination of such material. Once the material is deemed within the constitutional safeguard, any conduct which tends to restrain or hamper a free press carries a strong presumption of unconstitutionality, unless justified on some legally sufficient basis.[24] The major thrust of the first amendment is the prevention of conduct that may create prior restraints upon publication.[25] The first amendment also prohibits restraints subsequent to publication,[26] and protects the public's right to receive information.[27] The courts have not only

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17. 434 F.2d at 1083.

18. *See* note 4 *supra.*

19. *Cf.*, Grosjean v. American Press Co., 297 U.S. 233 (1936), wherein the Supreme Court indicated that indirect as well as direct suppression of first amendment rights cannot be tolerated.

20. The reporter had been covering the Black Panthers since the movement started. Initially, he had been received with hesitation and extreme caution, but gradually won the confidence and trust of the party leaders and the rank-and-file members. Because of this relationship, the Panthers now discuss party views and activities freely with him. This relationship has also enabled him to write informed and balanced articles concerning party matters unavailable to most other newsmen. The reporter maintained that his appearance before a *secret* hearing open to any information he might possess would cause the party to fear the confidential relationship and become reluctant to speak with any reporter, thereby denying the public access to divergent points of view. Reporters could be transformed into constant government investigators should they be forced to reveal any and all information concerning the Panthers. *See* 434 F.2d at 1084.

21. *Id.*

22. Associated Press v. United States, 326 U.S. 1 (1945); Bridges v. California, 314 U.S. 252 (1941); *see also* Barron, *Access to the Press: A New First Amendment Right,* 80 HARV. L. REV. 1641 (1967).

23. *See, e.g.,* New York Times v. Sullivan, 376 U.S. 254 (1964).

24. See Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963). *See also* United States v. New York Times, — S. Ct. — (1971).

25. Near v. Minnesota, 283 U.S. 697 (1931).

26. Talley v. California, 362 U.S. 60 (1960); Winters v. New York, 333 U.S. 507 (1948).

27. Lamont v. Postmaster General, 381 U.S. 301 (1965); Martin v. Struthers, 319 U.S. 141 (1942).

attempted to invalidate intentional conduct that directly retards a free-flowing press, but have invalidated conduct that indirectly hampers the press as well.[28]

The reporter's position, in the instant case, was that his appearance before the grand jury would destroy his confidential relationship with the Black Panther Party and breach the trust that he had developed through his extensive work with them. The essence of his contention was that although the grand jury session was not intended to hamper the press, it would inevitably result in an indirect restraint.[29] The Supreme Court has consistently recognized the need for privacy in certain personal relationships and anonymity has been upheld where necessary.[30] The general investigation by the grand jury was found to be within the definition of an invalid restraint operating indirectly to hamper the press,[31] and the protective order was therefore inadequate to protect the reporter's rights.

Having established a Constitutional privilege, the court then adopted the traditional "balancing test"[32] to resolve the conflict between the competing public interests of freedom of the press and the necessity of grand jury investigations. In this regard, however, several[33] writers have implied that the application of a balancing test is improper when dealing with such vital freedoms as those protected by the first amendment. It is submitted that a more appropriate approach would be to begin with the presumption that first amendment rights are absolute and that, therefore, any encroachment upon them, by forced testimony, would require a clear

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28. The courts have viewed conduct that tends to hamper the press unfavorably and have attempted to alleviate any threat to our nation's press. In New York Times v. Sullivan, 376 U.S. 254 (1964), the Supreme Court recognized that the threat of civil damages in libel suits may tend to obstruct newspaper discussion of public officials. The Court established a heavier burden of proof in libel actions to allow greater freedom of discussion in this area. *See also* American Communications Ass'n v. Douds, 339 U.S. 382 (1950); Grosjean v. American Press Co., 297 U.S. 233 (1935).

29. The reporter's position is analogous to the police-informant relationship. McCray v. Illinois, 386 U.S. 300 (1967); Roviaro v. United States, 353 U.S. 53 (1957). The Supreme Court has recognized the need for certain confidential relationships and realized that the disclosure of such to public view may destroy the essential confidential nature. A similar view is presented in N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958), wherein the Court found that a public disclosure of membership lists of certain groups may force some individuals to curtail their activities in such groups. *See also*, Shelton v. Tucker, 364 U.S. 479 (1960); Talley v. California, 362 U.S. 60 (1960); Bates v. Little Rock, 361 U.S. 516 (1960).

30. *See* note 29 *supra*. *See also* Comment, *The Constitutional Right to Anonymity: Free Speech, Disclosure, and the Devil*, 70 YALE L.J. 1084 (1961).

31. It is submitted that the court states the basis of the decision in broad general terms with disconnected quotations from questionable authority. For example, the court utilized Griswold v. Connecticut, 381 U.S. 479 (1965), wherein the Supreme Court by using the "penumbra theory" developed that decision to meet the facts of the particular case. The instant holding reflects the use of broad, ambiguous terms which could arguably be utilized to reach the desired result given any factual pattern concerning the first amendment.

32. When an abridgment of the first amendment flows inadvertently from an otherwise lawful governmental action, the resolution involves a balancing of the particular interests. Barenblatt v. United States, 360 U.S. 109 (1959).

33. *See, e.g.*, Guest and Stanzler, *The Constitutional Argument For Newsmen Concealing Their Sources*, 64 NW. U.L. REV. 18, 28 (1969).

showing of a compelling interest to the contrary.[34] This process would be consistent with the reasoning of the Supreme Court,[35] and could be argued forcefully in that there is an absence of a clear constitutional basis for the power to compel testimony.[36] The common law basis of determining the existence of a privilege should not control; rather a principle similar to that of the fifth amendment prohibition against self-incrimination should be followed. Certainly the fifth amendment serves to hamper the truth-finding process, but a refusal to testify on the basis of self-incrimination takes precedence over compulsory testimony.[37] In the instant case, the court, while stating that the balancing test was applicable, nevertheless required the Government to make a clear showing of a compelling and overriding interest.[38]

There is no question as to the propriety of the grand jury using its subpoena power to compel testimony.[39] However, this power is subject to mitigating circumstances. Under certain situations a substantial individual interest may outweigh the search for truth and exempt one from attending and giving testimony.[40] The provisions of the first amendment should be applied as a limitation upon grand jury power in order to provide the nation a truly "free press."[41] The subjecting of newsmen to general, undefined grand jury investigations can sever the trust and confidence established between a reporter and his sources of information. Thus, in weighing the competing interests involved, society gains benefits from a full recognition of "freedom of the press" that clearly outweigh the detrimental effects of a limitation upon *general* grand jury investigations.

The instant decision is strictly limited to the particular factual situation presented and a further limitation is created by the particular parties

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34. *Id.*

35. *See, e.g.*, Levine v. United States, 362 U.S. 610 (1960); United States v. Bryan, 339 U.S. 323 (1950). This would also be analogous to the burden required to force the disclosure of a police-informant. McCray v. Illinois, 386 U.S. 300 (1967); Roviaro v. United States, 353 U.S. 53 (1957).

36. This, of course, presupposes a judicial proceeding wherein the criminal defendant is not forced to forego the right to confront a witness. Even here, however, the police-informant relationship by analogy may alleviate the problems.

37. *See generally* Guest and Stanzler, *supra* note 10.

38. The court referred to Garland v. Torre, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958), which was the first decision to recognize the value and merit of the constitutional argument and require a showing of a compelling need for specific testimony. The test is: Does the information sought go to the heart of the case? Subsequent decisions have made reference to the Garland test but all have manipulated the situation and found the information sought to be essential. *See* note 15 *supra*.

39. *See* Blair v. United States, *supra* note 1. *See also* Shillitani v. United States, 384 U.S. 364 (1966) (and cases cited therein); Blackmer v. United States, 284 U.S. 421 (1932); Hale v. Henkel, 201 U.S. 43 (1906).

40. *See* United States v. Bryan, 339 U.S. 323 (1950); Blair v. United States, 250 U.S. 273 (1919).

41. *Cf.*, Watkins v. United States, 354 U.S. 178 (1957).

involved.[42] The court, treating the case as one of first impression, gave no specific criteria for future reference other than that of announcing a general rule without specifying what the government must show to negate the newsman's privilege.[43] It is submitted that the court employed questionable authority to support general statements in order to achieve the desired result.[44] Had the court utilized more precise legal reasoning to develop the opinion with a firm foundation, this decision could have had far-reaching effects. However, later decisions have either rejected the extended interpretation of "freedom of the press" and followed prior precedent[45] or have limited the application of *Caldwell* to the factual situation presented.[46]

R. FRED LEWIS

EXTENSION OF LIABILITY IN THE BAILMENT FOR HIRE

Plaintiff, United Airlines, was in need of a method by which passengers requiring wheelchairs could be loaded onto and unloaded from its aircraft. This need was revealed to the defendant, W. E. Johnson Equipment Co., Inc., and the two entered into a month-to-month lease agreement for a forklift type hoist, with lessor furnishing all maintenance, repair, and service. Fifteen days later, while a passenger was deplaning, the hoist fell and the passenger was severely injured. Plaintiff settled with the passenger and then brought suit against the Johnson Equipment Company for indemnification, alleging negligent maintenance and breach of implied

42. The court stated: "It is not every news source that is as sensitive as the Black Panther Party. . . ." 434 F.2d at 1090.

43. *See* note 8 *supra.*

The only suggestion of the Government's burden to negate such a privilege was advanced by the reporter.

> . . . the Government must show at least: (1) that there are reasonable grounds to believe the journalist has information, (2) specifically relevant to an identified episode that the grand jury has some factual basis for investigating as a possible violation of designated criminal statutes within its jurisdiction, and (3) that the government has no alternative sources of the same or equivalent information whose use would not entail an equal degree of incursion upon First Amendment freedoms. Once this minimal showing has been made, it remains for the courts to weigh the precise degree of investigative need that thus appears against the demonstrated degree of harm to First Amendment interests involved in compelling the journalist's testimony.

Caldwell v. United States, 434 F.2d 1081, 1090 (9th Cir. 1970). *See* People v. Dohrn, Case No. 69-3808, May 20, 1970, Cir. Ct. Cook County, Calif., Criminal Division.

44. *See* note 31 *supra.*

45. *See, In re* Pappas, 39 U.S.L.W. 2444 (Mass. Sup. Jud. Ct. 1971).

> We adhere to the view that there exists *no* constitutional newsman's privilege, either qualified or absolute, to refuse to appear and testify before a court or *grand jury.*

In re Pappas, *supra* at 2444.

46. United States v. Calley, 39 U.S.L.W. 2463 (Army General Court Martial, 5th Jud. Cir. 1971).