

## THE REPORTER'S PRIVILEGE:

### A NEW URGENCY

*Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970), cert. granted, 91 S.Ct. 1616 (1971).

Earl Caldwell, a Black correspondent for the *New York Times*, was subpoenaed in February of 1970 to testify before a federal grand jury conducting an investigation of the Black Panthers. Caldwell and the *New York Times* moved to quash the subpoena or, alternatively, to issue an order limiting the scope of inquiry to protect Caldwell's confidences. The district court ordered Caldwell to appear before the grand jury, but held that Caldwell could not be compelled to reveal confidential associations, sources, or information unless and until the government could show a compelling and overriding national interest in the testimony.<sup>1</sup> On appeal, the district court's order was dismissed<sup>2</sup> and the subpoena was reissued. Caldwell declined to appear on the grounds that his appearance before the grand jury threatened his professional relationship with the Black Panthers. Caldwell was cited for contempt. On appeal, the U.S. Court of Appeals for the ninth circuit reversed, remanded and *held*: where it has been shown that the public's first amendment right to be informed would be jeopardized by requiring a journalist to submit to a secret grand jury interrogation, the government must demonstrate a compelling need for the witness' presence before the judicial process can require attendance.<sup>3</sup>

At common law, a journalist possessed no privilege from disclosing confidential sources or communications.<sup>4</sup> Until recently, lack of a privilege has not been an object of controversy.<sup>5</sup> Journalist's sources of

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1. Application of Caldwell, 311 F. Supp. 358, 360-62 (N.D. Calif. 1970).

2. The government argued (1) that the order was interlocutory and therefore non-appellable, (2) that the appeal would be an undue interruption of the grand jury inquiry, and (3) that the appeal was frivolous. Brief for Appellee, *Caldwell v. U.S.*, 434 F. 2d 1081 (9th Cir. 1970).

3. *Caldwell v. United States*, 434 F.2d 1081, 1089 (9th Cir. 1970).

4. 8 J. WIGMORE, EVIDENCE § 2286 (McNaughton rev. 1961).

5. The earliest reported case in which the question of a journalistic privilege arose, though only by way of dictum, was *People ex rel. Phelps v. Fancher*, 2 Hun. 226 (N.Y. Sup. Ct., Gen. T. 1874). It was not until 1958 in *Garland v. Torre*, 259 F.2d 545 (2d Cir.), cert. denied, 358 U.S. 910 (1958), that counsel argued a privilege via freedom of the press. Early cases dealing with the constitutional question were *In re Goodfader's Appeal*, 45 Hawaii 317, 367 P.2d 472 (1961); *State v. Buchanan*, 250 Ore. 244, 436 P.2d 729 (1967), cert. denied, 392 U.S. 905 (1968); *In re Taylor*, 412 Pa. 32, 193 A.2d 181 (1963); *Murphy v. Colorado* (unreported), cert. denied 365 U.S. 843 (1961). See also Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 Nw. U. L. REV. 18 (1969).

Common law arguments had included loss of estate, public interest in the free flow of news, and analogy to the traditional common law privileges.

information or communications with an informant have been only occasionally material to an investigation or litigation. When the information was material, journalists often chose to suffer a contempt citation rather than reveal a confidence.<sup>6</sup> The claim of privilege has commonly arisen in two sets of circumstances: (1) the journalist, having recently published charges alleging misconduct in a public institution, is asked to testify before an appropriate investigatory body such as a grand jury;<sup>7</sup> (2) a public official or a person otherwise in the public eye brings a civil suit for defamation, and the journalist is asked for the source of the defamatory statement.<sup>8</sup>

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6. The profession as a whole, in its own interest, has "made a promise not to obey the law." *Plunkett v. Hamilton*, 70 S.E. 781, 786 (Ga. 1911). The American Newspaper Guild's 1934 promulgation of the newsman's code of ethics included the following:

Newspapermen shall refuse to reveal confidences or disclose sources of confidential information in court or before other judicial or investigative bodies . . . .

Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 Nw. U. L. Rev. 18 n. 54 (1969).

7. See *Ex parte Lawrence*, 116 Cal. 298, 48 P. 124 (1897); *Clein v. State*, 52 S.2d 117 (Fla. 1950); *Plunkett v. Hamilton*, 136 Ga. 72, 70 S.E. 781 (1911); *State v. Donovan*, 129 N.J.L. 478, 30 A.2d 421 (1943); *In re Grunow*, 84 N.J.L. 235, 85 A. 1011 (1913); *People ex rel. Mooney v. Sheriff of New York County*, 269 N.Y. 291, 199 N.E. 415 (1936); *In Re Taylor*, 412 Pa. 32, 193 A.2d 181 (1963).

8. Public Official: see *Brewster v. Boston Herald-Traveler Corp.*, 20 F.R.D. 416 (D. Mass. 1957); *Ex parte Sparrow*, 14 F.R.D. 351 (N.D. Ala. 1953); *Murphy v. Colorado* (unreported), cert. denied, 365 U.S. 843 (1961); *In re Goodfader's Appeal*, 45 Hawaii 317, 367 P.2d 472 (1961); *Becroft v. Point Pleasant Printing Co.*, 82 N.J. Super. 269, 197 A.2d 416 (Super. Ct. 1964); *Brogan v. Passaic Daily News*, 22 N.J. 139, 123 A.2d 473 (1956). Public Personage: see *Garland v. Torre*, 259 F.2d 545 (2d Cir.), cert. denied, 358 U.S. 910 (1958); *Cepeda v. Cohan*, 233 F. Supp. 465 (S.D.N.Y. 1964).

Since the privilege will most frequently arise in connection with a public official or office, or in connection with a matter of public interest, and in view of the growing recognition of the first amendment in the field, the time may be approaching when the holdings of the United States Supreme Court in *Times v. Sullivan*, 376 U.S. 254 (1964), and its progeny will be viewed as supporting a privilege in these areas subject only to a compelling and overriding national interest. Indeed, Caldwell's Brief argued that whatever had been the constitutional posture of the privilege before *Times*, that case marked the beginning of a wholly new ballgame. See Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 Nw. U. L. Rev. 18, 35 (1969).

There are at least three other distinct situations in which the privilege has been claimed: (1) where either the prosecution or defense seeks the journalist's testimony in the trial of a third person; see e.g., *People v. Durrant*, 116 Cal. 179, 48 P.75 (1897); (2) where the newspaper publishes state secrets or the secret proceedings of grand juries; see e.g., *In re Wayne*, 4 Hawaii Dist. F. 475 (1914); (3) where the journalist is a witness to the perpetration of crime; see, e.g., *Branzburg v. Pound*, 461 S.W.2d 345 (Ky. App. 1970). It is suggested that in the first situation where the defense can show that the newsman's information is relevant and material and not readily obtainable elsewhere, the sixth amendment will outweigh any first amendment protection. In (2) and (3) the journalist is a party to an illegal act, and thereby loses the privilege.

Presently the two bases for the journalists' claim to privilege are statutory and constitutional. Although sixteen states have enacted a statutory privilege,<sup>9</sup> the constitutional arguments have generally not been recognized by the courts. But with the advent of *Caldwell* and other recent cases concerning press relations with radical, militant or otherwise "sensitive" groups,<sup>10</sup> the trend may be reversing itself, if only in this limited area.

Courts considering the first amendment privilege have employed a traditional "balancing" test,<sup>11</sup> and found that the public interest in the

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9. ALA. CODE RECOMPILED tit. 7, § 370 (1960); ARIZ. REV. STAT. ANN. § 12-2237 (Supp. 1970); ARK. STAT. ANN. § 43-917 (1964); CAL. EVID. CODE ANN. § 1070 (Deering 1966); IND. ANN. STAT. § 2-1733 (1968); KY. REV. STAT. § 421.100 (1969); LA. REV. STAT. §§ 45.1451-54 (Cum Supp. 1971); MD. ANN. CODE art. 35, § 2 (1965); MICH. STAT. ANN. § 28.945(1) (1954); MONT. REV. CODES tit. 93, ch. 601-2 (1964 5; NEV. REV. STAT. § 48.087 (1969); N.J. STAT. ANN. § 2A: 84A-21-29 (Supp. 1970); N.M. STAT. ANN. § 20-1-12.1 (Supp. 1970); N.Y. CIVIL RIGHTS LAW § 79-h (McKinney Supp. 1970); OHIO REV. CODE ANN. § 2739.12 (1954); PA. STAT. ANN. tit. 28, § 330 (Supp. 1971).

Thirteen of the sixteen have adopted an absolute privilege. Three offer a qualified privilege. It is to be noted that the statutory language generally protects only the journalist's "sources" and not a wider range of confidential communications. This is because in the past the issue had been limited to the duty of the newsman to reveal his informant and not, as today, the contents of the disclosure.

10. *People v. Dohrn*, No. 69-3808 (Cir. Ct. Cook County, Crim. Div. May 20, 1970); *Levin v. Marshall*, Civil No. 70-1096 (D. Md. Sept. 21, 1970); *People v. Rios*, No. 75129 (San Francisco County Super. Ct. July 15, 1970); *Air Transport Assn. v. Professional Air Traffic Controllers Organization*, No. 70-C-400 (E.D.N.Y. April 6, 1970). See *N.Y. Times*, Aug. 11, 1970, at 24, cols. 1-3.

The extent to which the federal government has already recognized such arguments is indicated by guidelines issued to the Department of Justice in the fall of 1970. The press release warned that "compulsory process in some circumstances may have a limiting effect on the exercise of first amendment rights. In determining whether to request issuance of a subpoena to the press, the approach in every case must be to weigh that limiting effect against the public interest to be served in the fair administration of justice. The justice department official is directed to first attempt to "negotiate" with the newsman in question. If negotiations fail, the official must request no less than an express authorization from the Attorney General.

According to the release, such authorization will be granted upon a consideration of the following factors: (1) If the subpoena is in connection with a criminal investigation, there must be sufficient reason to believe a crime has occurred from nonpress sources; (2) The information must appear to be material; (3) The government should have unsuccessfully attempted to obtain the information from nonpress sources; (4) Authorization for requests for subpoenas should normally be limited to the verification of published information and to such surrounding circumstances related to the accuracy of the published information; (5) Great caution should be observed in requesting subpoena authorization by the Attorney General for unpublished information, or where an orthodox first amendment defense is raised or where a serious claim of confidentiality is alleged; (6) Even subpoena authorization requests for publicly disclosed information should be treated with care because, for example, cameramen have recently been subjected to harassments on the grounds that their photographs will become available to the government.

11. *Konigsberg v. State Bar*, 366 U.S. 36, 51 (1961); *Barenblatt v. United States*, 360 U.S.

fair administration of justice outweighed any possible infringement of freedom of the press. The possible restraints on the flow of information to the public or on the ability of the newsman to gather news were generally regarded by the courts and commentators alike as negligible.<sup>12</sup> In *Caldwell*, the reporter's tenuous ties with the Black Panthers offered a unique opportunity for a successful first amendment argument. In 1969, Caldwell had been reassigned from New York City to San Francisco after the resident white correspondents had been unable to establish the necessary rapport with the Panthers.<sup>13</sup> Caldwell was able to report extensively on the activities of the group. After issuance of the subpoena, the Panthers became noticeably shy of the press.<sup>14</sup> Since other dissident groups had reacted similarly in like situations,<sup>15</sup> Caldwell

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109, 126-27 (1959). The "balancing" test, as used by the first courts considering the constitutional privilege, may have been no innovation over the practice in a jurisdiction with no protection:

[O]ne must assume that the tests of importance . . . are often applied in jurisdictions with no privilege. In civil cases there is little served by going into the contempt procedure for unimportant information. In grand jury appearances and criminal cases, district attorneys must weigh their desire for information against the need for cordial press relations and their sympathy for the journalist's ethic.

Note & Comment, 46 ORE. L. REV. 99 (1966).

12. See Beaver, *The Newsmen's Code, The Claim of Privilege & Everyman's Right to Evidence*, 47 ORE. L. REV. 243 (1968); Carter, *The Journalist, His Informant & Testimonial Privilege*, 35 N.Y. U. L. REV. 1111 (1960); Note, *The Right of a Newsmen to Refrain from Divulging the Sources of His Information*, 36 VA. L. REV. 61 (1950); Comment, *Compulsory Disclosure of a Newsmen's Source: A Compromise Proposal*, 54 NW. U. L. REV. 243 (1959).

Or as Guest and Stanzler, the most vigorous proponents to date for a first amendment privilege, are forced to admit: "We simply cannot measure the effect on informants." Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NW. U. L. REV. 18 at 44 (1969).

13. Affidavit of Earl Caldwell at 2.

14. ABC News tried to do a documentary on the Party after Caldwell's subpoena, but the Panthers refused to participate unless ABC would furnish a letter pledging to fight any subpoena of out-takes (i.e., film shot by ABC but not shown on television as part of the documentary) to the highest court possible. ABC did not furnish the letter. Affidavit of Timothy C. Knight.

15. Typical of the experience related was that of John Kifner, a National Correspondent for the *Times*:

Anthony Riply of the *Times* testified under subpoena before the House Internal Security Committee in Washington, D.C. on June 3, 1969, about stories he had written the previous year on the 1968 national convention of the S.D.S.

Two weeks after he testified, S.D.S. held its 1969 convention in Chicago. I was assigned to cover it for the *Times*. Because Mr. Riply, a *Times* reporter, had testified about the S.D.S., the reaction to me as a reporter for the *Times* at the convention was extremely hostile. A resolution was presented to the delegates on June 18, the first day of the convention, to exclude any representative of the *Times* from all meetings and to require all other reporters to sign affidavits that they would not testify before the government investigating committees. This resolution specifically criticized Mr. Riply for testifying before the Committee. It asserted that reporters have chosen to go to jail for contempt

had impressive evidence of a "drastic chilling and repressive effect upon first amendment freedoms."<sup>16</sup>

But the government had a strong position based on the traditionally far-ranging scope of the grand jury's investigative power. It has long been settled that testimony and attendance before the grand jury are public duties which every person is bound to perform.<sup>17</sup> The grand jury has never been required to furnish a witness an outline of the scope of the investigation.<sup>18</sup> "It [has] the right and indeed the duty to follow leads wherever they [point]."<sup>19</sup> It even has the power to probe into an area of recognized privilege in order to search for unprivileged matter.<sup>20</sup> Possible reprisal by a prospective defendant furnishes no reason not to appear as a witness even when it is based upon a fear of bodily harm.<sup>21</sup>

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rather than testify. It said that Mr. Riply and the *Times*, by acquiescing with the Committee's subpoena, had "taken the side of the nation's most notorious witch hunters." The affidavit that other reporters would have had to sign required them to swear that they would not divulge any information about the convention to any investigatory body or in any court.

The delegates considered the resolution but, instead they approved a stronger resolution excluding all "establishment" reporters from the convention. This meant reporters from all papers of general circulation.

Affidavit of John Kifner at 2.

J. Anthony Lukas, the *Times*' Roving National Correspondent stated:

To be sure, there is a good deal of paranoia in the Movement [of left wing radicals]. There is an incessant concern about "spies", "finks" and "F.B.I. informers". But this is not surprising in light of the effective infiltration of the Movement. In any case, it is a problem a reporter must grapple with if he is going to cover the Movement.

Affidavit of J. Anthony Lukas at 3.

16. Movant's Brief at 2.

17. *United States v. Bryan*, 339 U.S. 323, 331 (1950); *Blair v. United States*, 250 U.S. 273, 281 (1919). See also Note, *The Grand Jury as an Investigatory Body*, 74 HARV. L. REV. 590 (1961).

18. *LaRocca v. United States*, 337 F.2d 39, 43 (8th Cir. 1964); *Hale v. Henkel*, 201 U.S. 43 (1906). The San Francisco grand jury before which Caldwell had been summoned was investigating possible violations on the part of the Black Panthers of 18 U.S.C. § 231 ("Civil Disorders"), § 1341 ("Frauds and Swindles"), § 1751 ("Presidential Assassination, Kidnapping and Assault"), and § 2101 ("Riots"). Allegedly, the Panther Chief of Staff, David Hilliard, had made public threats to kill President Nixon. One of Caldwell's feature articles subsequent to the alleged threats quoted Hilliard as saying, "We are special. We advocate the very direct overthrow of the Government by way of force and violence . . ." *N.Y. Times*, Dec. 14, 1969 at 64, col. 1. The government argued that "this statement, coming after the threat of the Panthers to kill President Nixon . . . appeared relevant to an inquiry or investigation of a possible violation in connection with the publication of these statements and related activities of the responsible individuals." Affidavit of Francis L. Williamson, attached to the Government's Memorandum in Opposition to Motion to Quash Grand Jury Subpoenas at 2-3.

19. *United States v. Winter*, 348 F.2d 204, 208 (2d Cir.), cert. denied, 382 U.S. 955 (1965).

20. *Colton v. United States*, 306 F.2d 633, 638 (1962).

21. *Piemonte v. United States*, 367 U.S. 556, 559 (1961).

The ninth circuit unanimously agreed with Caldwell that "these general propositions of Government authority [the historic traditions of the Grand Jury with its extensive powers of investigation] necessarily are tempered by constitutional prohibitions and other exceptional circumstances."<sup>22</sup> Guided by "decisions regarding first amendment conflicts with legislative investigatory needs" the ninth circuit found that the "Supreme Court has required the sacrifice of first amendment freedoms only where a compelling need for the particular testimony in question is demonstrated."<sup>23</sup>

The court recognized the reporter's privilege where the compelling need for the inquiry has not been shown.<sup>24</sup> Additionally, the court recognized a limited right not to attend a grand jury investigation when a reporter enjoys the unique trust of a sensitive news source.<sup>25</sup> Even in this narrow area, the court recognized that the right not to attend was limited to cases where the government could not show a competing interest. The bare minimum required of the government would be a showing that a reporter "armed with his privilege would still serve a useful purpose before the grand jury."<sup>26</sup>

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22. 434 F.2d at 1085.

23. *Id.* at 1085-86.

24. *Id.* at 1086.

25. *Id.* at 1089.

26. *Id.*

The opinion referred by way of footnote to *People v. Dohrn*, No. 69-3808 (Cir. Ct. Cook County, Crim. Div. May 20, 1970). *Dohrn* assumed that the issuance of a subpoena to a newsmen had a chilling effect upon freedom of the press and declared that the subpoena statutes were unconstitutional because they did not provide for notice and hearing on the need for the information of the party seeking the subpoena. In such a hearing, the court said, the burden is upon the party seeking the subpoena to show three things:

There is probable cause to believe that the party seeking the evidence . . . [believes] that there is relevant evidence in the possession of the particular news medium sought to be subpoenaed; that the use of the subpoena is the only method available for obtaining that evidence; and that the evidence is so important that the non-production of that evidence would cause a miscarriage of justice.

Caldwell in his brief to the court suggested:

'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, had 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 in 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.'

434 F.2d at 1089 n. 10.

Although the Supreme Court on certiorari may well recognize the reporter's privilege, the right not to attend can be distinguished and criticized. First, the grand jury may be unable to show that a reporter can still serve a useful purpose unless it can subpoena him and determine the scope of this privilege. Second, the public's right to be informed is not fostered any further by the right to resist a subpoena than by the right to be silent concerning a confidential relationship. In both cases, the safety of the Panther's confidences are lodged in the willingness of the reporter to resist judicial inquiry. Since the protection is equal under either right, the disclosure by the reporter will probably be the same. Thus, by granting Caldwell the right not to appear, the court may be granting judicial recognition to the unfounded fear of a special interest group.

The response is equally persuasive. The relationship a reporter has with a dissident group is tenuous. The information imparted is not tidily classified under headings "confidential" and "non-confidential."<sup>27</sup> Even if it were, as the ninth circuit recognized, "[m]ilitant groups might very understandably fear that, under the pressure of examination before a Grand Jury, the witness may fail to protect their confidences with quite the same sure judgment he invokes in the normal course of his professional work."<sup>28</sup> Because of the inherent secrecy of grand jury proceedings, a characteristic admittedly designed for the protection of those under investigation, the unfounded fear of a special interest group, if found to indeed exist, is a fact which the court can hardly well ignore in view of the the dictates of the first amendment.

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27. *Id.* at 1088.

28. *Id.*