FREEDOM OF THE PRESS AND THE NEWSMAN'S PRIVILEGE

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This article is concerned primarily with an analysis of the newsman's alleged privilege of non-disclosure of confidential sources of information, which privilege has been asserted by the attorneys for the Defendant reporters in the Caldwell and Pappas cases, currently on the docket of the Supreme Court of the United States. Although there is a third case on the current docket (Branzburg v. Hayes, No. 70-58) posing the same questions as those in Pappas and Caldwell, this case has not been analyzed as the fact pattern is markedly different from those in the other two cases.

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INTRODUCTION - No Journalist's Privilege at Common Law

"Neither in England nor in the United States does the common law give a newsman the privilege to conceal confidential sources."[1] "It is a general principle of our judicial system that witnesses properly summoned before a court must give their testimony unless specifically privileged or exempted."[2] "For more than three centuries it has been recognized as fundamental maxim that the public...has a right to everyman's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give testimony one is capable of giving, and that any exceptions which may exist are distinctly exceptional, being so many derogations from a positive general rule."[3]

"The duty to testify at judicial proceedings is a venerable instrument of justice which was recognized early in the development of English law and has been clearly acknowledged by the Supreme Court."[4] The power to compel testimony extends to grand juries and to the taking of depositions.[5] It has also been held applicable to legislative inquiries.[6]

It is asserted that the power to compel testimony is necessary in grand jury proceedings. The grand jury serves two important functions: "to examine into the commission of crimes" and "to stand between the

prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will."[7]

The purposes of grand jury inquiries necessitates a broad scope, a wide latitude, and a correlative authority to question witnesses almost without limitation as to subject matter.[8] In exceptional circumstances, such as situations involving the Fifth Amendment protection against self-incrimination, the obligation to testify is subject to mitigation. Where public policy justifies protection of a particular confidential relationship, privileged situations have been found to exist. "The common law recognized only four relationships which gave rise to privileged communications: attorney-client, husband-wife, informant-government, and juror-juror. Two others, physician-patient and clergyman-penitent have received almost universal statutory implimentation."[9] "It is clearly the general rule at common law that journalists enjoy no special right to withhold testimony relating to confidential communications between themselves and their sources of information."[10] Courts have uniformly denied the existence of a reporters privilege[11] with but two exceptions.[12]

THE CALDWELL DECISION

Earl Caldwell is a black New York Times reporter who was based in San Francisco and who wrote a series of articles on the Black Panther Party and its leaders. After several months, during which time Caldwell developed confidential relationships with several members of the Black Panther Party, the Times published a series of Caldwell's articles throughout 1969, which covered the activities and attitudes of the Panthers.

On 2 February 1970, a federal grand jury, investigating possible breaches of federal criminal law by members of the Black Panther Party, subpoenaed Caldwell to appear before it to testify. A subpoena duces tecum directed Caldwell to bring with him his notes and tape recordings of interviews with officers and spokesmen of the Black Panthers. Caldwell and the Times moved to quash the subpoena, or, alternatively, to issue a protective order. The District Court for the Northern District of California issued the protective order but denied the motion to quash. The order protected Caldwell from being compelled 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."[13] The order provided that he could not be required to reveal confidential

associations and information acquired by him as a news gatherer unless the government showed "a compelling and overriding national interest in requiring Mr. Caldwell's testimony which cannot be served by any alternative means."[14]

As the events transpired, the term of the old grand jury expired and a new grand jury was sworn. On 22 May 1970, a new subpoena was served on Caldwell directing him to appear and containing the provisions of the protective order. Caldwell refused to appear and was held in civil contempt. On appeal by Caldwell, the Government having taken no appeal from the protective order, the United States Court of Appeals for the Ninth Circuit reversed the judgment of contempt.[15]

Caldwell had argued that the "inevitable effect of the subpoenas will be to suppress vital First Amendment freedoms...by driving a wedge of distrust and silence between the news media and the militants and...in the absence of a compelling governmental interest - not shown here"[16] his appearance before the grand jury should not be required.

The Court of Appeals held

> "Appellant asserted in his affidavit that there is nothing to which he could testify (beyond that which he had already made public and for which, therefore, his appearance is unnecessary) that is not protected by the District Court's order. If this is true - and the Government apparently has not believed it necessary to dispute it - appellant's response to the subpoena would be a barren performance - one of

> no benefit to the Grand Jury. To destroy appellant's capacity as a news gatherer for such a return hardly makes sense. Since the cost to the public of excusing his attendance is so slight, it may be said that there is here no public interest of real substance in competition with the First Amendment freedoms that are jeopardized...We hold that 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 secret Grand Jury interrogation, the Government must respond by demonstrating a compelling need for the witness's presence before judicial process can issue to require attendance."[17]

The Court decided that Caldwell was entitled to a privilege to refuse to testify concerning information received from his confidential sources, and that he was entitled to refuse to attend the Grand Jury hearings unless the Government made out a compelling interest in his testimony prior to his appearance.[18]

THE PAPPAS DECISION

The facts pertaining to In the Matter of Paul Pappas[19] are similar to those in the Caldwell case.

Defendant, Paul Passas, is a news reporter for television station WTEV, whose principal offices are located in New Bedford, Massachusetts. Pappas had been assigned to cover events occurring during the civil disorders which broke out in New Bedford during the summer of 1970. On July 30, 1970, he was granted permission by members of the Black Panther Party to enter their New Bedford headquarters. The permission was granted on the following conditions:

(1) If there was no police raid on the headquarters, anything which Pappas heard or witnessed visually was to be maintained in strict confidence;

(2) If a police raid did occur on the headquarters during Pappas' stay there, he would be allowed to report on whatever occurred.

According to Pappas' attorneys, the Panthers' motives for allowing Pappas to enter the headquarters was that the Panthers wanted "fair" news coverage of a suspected imminent police raid.[20] The Panthers alleged that heretofore the news media was always biased in favor of the police during such raids.

During the approximately three hours that Pappas was in the headquarters, he observed activities occur-

ing there, and engaged Panthers in conversation. However, he made no written notes of his observations and as there was no police raid that night, he did not file a report.

Two months later, on 22 September 1970, Pappas was summoned before the Bristol County grand jury, which was attempting to ascertain criminal culpability for the disturbances in New Bedford. The grand jury asked questions of Pappas relating to his observations in the Panther headquarters, which Pappas refused to answer on the grounds that he had a limited constitutional privilege to protect confidential sources; that to reveal such information would constitute a breach of promise which he had made to the Panthers; that his livelihood would be impaired by his future inability to obtain information through the same or similar sources; and that his testimony might place him in physical danger.

Pappas was again subpoenaed to appear before the grand jury. The Superior Court for Bristol County denied Pappas' motion to quash the subpoena and the ruling was reported to the Supreme Judicial Court of Massachusetts.

The Supreme Judicial Court expressed the opinion that it did not feel bound by the Ninth Circuit Court's decision in the Caldwell case. "Were we to adopt the broad conclusions of that decision, that a newsman's

privilege exists because of the First Amendment, we would be engaging in judicial amendment of the Constitution or judicial legislation. Requiring a newsman to testify about facts of his knowledge does not prevent their publication or the circulation of information."[21]

The Court summed up its holding that there exists no newsman's privilege as follows:

> "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. The obligation of newsmen, we think, is that of every citizen, viz., to appear when summoned, with relevant written or other material when required, and to answer relevant and reasonable inquiries. Such appearances, however, like those of other citizens, are subject to supervision by the presiding judge to prevent oppressive, unnecessary, irrelevant, and other improper inquiry and investigation (and, of course, subject to due protection of the privilege of any witness against self-incrimination.)[22]

Thus, the Court upheld the ruling of the Superior Court and dismissed Pappas' contention of a newsman's privilege of non-disclosure based on the First Amendment of the Federal Constitution.

ARGUMENT IN SUPPORT OF NEWSMAN'S PRIVILEGE

I. First Amendment Right

The public's right to the free flow of information and news is protected by the First Amendment. The First Amendment protection is violated when reporters are forced to divulge confidential sources or information. When a First Amendment right clashes with any asserted common law right, the presumption is that the constitutional right must prevail.

"In contradiction to the prior cases which pondered a constitutional foundation for the journalistic privilege, the Caldwell court did not set its focus on the individual newspaperman's right to such a privilege qua individual; rather it concentrated on the 'public's First Amendment right to be informed.'"[23] The right sought to be protected by the reporter's privilege is the public's First Amendment right to the free flow of information. The individual reporter's financial or career interest in the privilege is irrelevant to the question of whether the public enjoys a constitutional right to the untrammeled flow of news. "That books, newspapers and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment."[24] In Time v. Hill[25] the court stated that the constitutional guarantees in the news area "are

not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press insures the maintenance of our political system and an open society."

It must be kept clearly in mind that apart from the public's constitutional right, which is protected through the vehicle of the reporter's privilege, the newsman and informer have no independent ground for asserting the privilege. "The newsman-informer relationship for its own sake is complete irrelevant. The sole asserted interest is free flow of news to the public."[26]

As the Supreme Court said in Red Lion Broadcasting Co. v. Federal Communications Commission[27] "The people as a whole retain their interest in free speech by radio (and, of course, in free speech by television or the printed medium) and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, and not the right of broadcasters, which is paramount." The reporter's access to news is, in effect, the public's access. The right of the public to the free flow of information is at stake here, and it may be asserted by the reporter for it is through his agency that this constitutional right is translated into fact, i.e., the transmission of news to the public. "The people's right to be informed by

print and electronic news media is thus the central concern of the First Amendment's Freedom of Speech and of the Press Clause."[28]

Opponents of the reporter's privilege often start with the premise that there is no right to withhold testimony, and they then challenge adherents of the privilege to prove its existence at common law. This approach avoids the crux of the controversy: a constitutional right, not a common law privilege, is being asserted. When the First Amendment right of freedom of speech and press is asserted, unless it is clear that such claim is completely frivolous, it is incumbent upon those denying such right to disprove it. They have the burden of proof, since constitutional rights must be sedulously fostered to avoid encroachment upon those rights. When a constitutional right is at issue, the nonexistence of that right must be clearly demonstrated before those who deny its existence may be allowed to prevail.

First Amendment guarantees of free press rest upon the assumption that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[29] "Under the First Amendment, conduct tending to restrain the free flow of news is presumed unconstitutional unless strongly justified."[30] (Emphasis added.) "Rather than starting with the common law presumption against any

privilege and trying to justify an exception because of a constitutional interest, a proper analysis should start with the constitutional presumption of a privilege and try to justify its denial because of a common law interest in compulsory testimony."[30] Typical of this approach would be situation in which a witness asserted the Fifth Amendment right against self-incrimination. A proper analysis presumes the constitutional right adheres and puts the burden on those who disagree to either prove the right is inapplicable in the particular situation or that, though it applies, it must fall in the stead of a conflicting and more compelling right.

When dealing with the First Amendment, a constitutional presumption of protection is involved. As the Supreme Court has said, "Any system of prior restraints of expression comes to this court bearing a heavy presumption against its constitutional validity."[32] The Supreme Court has indicated that freedom of the press is to be given "the broadest scope that can be countenanced in an ordered society."[33] Requiring reporters to divulge confidential sources or information would discourage those sources from transmitting news and would therefore inhibit the free flow of news to the public in violation of the First protections. "In holding that the Constitution secures a journalist's privilege, the principal court relied on

the public's constitutional right to be informed."[34] A form of self-censorship abhorrent to the First Amendment would result if journalists felt the need to temper their reporting in order to reduce the probability of interrogation,[35] and it will have the effect of scaring off informants and, thus, drying up news sources. It is an established fact that many news stories are based on information disclosed in confidence. Erwin D. Canham, Editor-in-Chief of the Christian Science Monitor, has estimated that from 33% to 50% of the newspaper's major stories involve confidential sources, and the Wall Street Journal has stated that at least 15% of its stories are based on information received from confidential sources.[36] The First Amendment right of the public will be infringed upon if reporters are involuntarily brought before grand juries seeking testimony as to the reporters' confidential sources, and informants are less likely to come forward if they face the risk of exposure. Regarding the informant, "His communication...is probably the result of calculation and more likely to be affected by the risk of exposure."[37]

Other authorities have similarly noted this problem:

> "It is not unreasonable to expect journalists everywhere to temper their reporting so as to reduce the probability that they will be required to submit to interrogation. The First

> Amendment guards against governmental action that induces self-censorship."[38]
>
> "Without certainty, parties responsible for the dissemination of information to the public will be unable to predict when the state can suppress their activities. Thus there is a substantial possibility that they will unduly censor their publications to avoid punishment."[39]
>
> "The mere threat of sanctions may deter the exercise of free speech or free association almost as much as the actual application of sanctions."[40]
>
> "The right to confidential news gatherer-informant relationship has been found to be within the First Amendment press freedom."[41]

The Department of Justice, which now argues against a reporter's privilege, has in its guidelines admitted that action such as was taken in the Caldwell case could violate the public's and, by proxy, a reporter's First Amendment rights. The Attorney General's Guidelines, issued on August 11, 1970, state that "The Department of Justice recognizes that compulsory process in some circumstances may have a limiting effect on the exercise of First Amendment rights."[42]

The argument that many sources, such as the Black Panthers, who probably depend to a large extent on media exposure, would still communicate to the public by means of press release does not vitiate the infringement or encroachment upon the free flow of news to the public is an invasion that should not be lightly countenanced. If reporters, the newsgathering agents of the

public, are unduly imposed upon, the public's right to access to news is violated. "It is not enough that the public's knowledge of groups such as the Black Panthers should be confined to their deliberate public pronouncements or distant news accounts of their occasional dramatic forays into the public view."[43] "The public's right to know is not satisfied by news media which act as conveyor belts for handouts and releases, and as stationary eye-witnesses. It is satisfied only if reporters can undertake independent, objective investigations."[44]

If First Amendment rights are not guarded, they may be eroded. "It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments."[45] "The freedoms of expression must be ringed about with adequate bulwarks."[46]

In order to protect the public's First Amendment right to the free flow of news, reporters must be afforded the constitutional protection, as news gathering agents of the public, of refusal to appear before grand juries that seek information related to the newsman's confidential sources or information. "The weight of the First Amendment is on the reporters' side, because the assumption underlying the First Amendment is that secrecy and the control of news are all too inviting, all too easily achieved, and in general,

all too undesirable. The First Amendment weds the public interest in the flow of news to the reporter's professional interest, and it is this public interest, not the reporter's"[47] that the First Amendment protects.

II. Tests of Clear and Compelling Need

As the reporter's privilege is based on a constitutional right, before that right can give way to the need for compelled testimony, a clear and compelling need for that testimony must be shown. Proof of clear and compelling need may be established when three tests are met:

(1) A crime was committed and it is proved that the reporter has specific knowledge concerning that crime;

(2) The Government has no alternative means of obtaining the information. The Government must demonstrate that due diligence was used in trying to obtain the information elsewhere;

(3) The violation of which the reporter has knowledge is a major crime.

The power to compel testimony is not absolute: It often must yield to overriding considerations involving the First, Fourth and Fifth Amendments and also to the the various privileged communications recognized at common law or by state. "An adequate foundation for

inquiry must be laid before proceeding in such a manner as will substantially intrude upon and severely curtail or inhibit constitutionally protected activities."[48]

There is a clear need for proof that the reporter has specific information that is sought. If the government could compel testimony without having to establish that a reporter had information needed by the Government, this would open the door to fishing expeditions into the murkiest of waters, inviting an encroachment and trampling on protected constitutional rights. As the public's right to know is protected by the Constitution, the case made by those seeking the protected information must be so overwhelmingly strong as to override the constitutional protections. It is therefore obvious that before the Government is allowed to tread on constitutional protections, it must be clear that the reporter at least has sought the information. Otherwise there could be an invasion of constitutional rights to promote a wild fishing expedition or to compel a "barren performance."

It is clear that the "no alternative means" test is needed. Before constitutional rights are put in jeopardy, the need for the information protected by those rights must be compelling. Obviously, the need for the information cannot be compelling if the information is obtainable elsewhere. In speaking of the possible infringement upon First Amendment rights by

the grant jury's power to compel testimony, the United States District Court in Caldwell said "Such power shall not be exercised in a manner likely to (infringe First Amendment rights) until there has been a clear showing of a compelling and overriding national interest that cannot be served by alternative means."[49]

As to the requirement that the reporter has the specific knowledge, "A concomitant of the right to a protected relationship should be the requirement that the party seeking the newsman's testimony show cause that the reporter has reason to know about the defendant and his alleged criminal acts."[50] "The requisite showing should include specific evidence, such as the reporter's own writings or testimony of government informers, that the reporter has information relating to elements of the alleged crime."[51]

The Department of Justice Guidelines support the need for minimal tests that must be met before a newsman can be forced to reveal confidential sources and information. The Department of Justice "does not consider the press 'an investigative arm of the governments'" The Guidelines stipulate that all reasonable efforts be made to obtain the sought information from non-media sources before subpoenas are issued to reporters; that there be sufficient reason, based on information obtained from non-press sources, to believe that a crime has been committed, and that the press not

be used "as a spring board for investigations"; and that there be sufficient reason to believe "that the information sought is essential to a successful investigation----particularly with reference to di-directly establishing the guilt or innocence...(and that a subpoena) should not be used to obtain peripheral, non-essential or speculative information." There seems to be an implied condition that even where the guidelines requirements are satisfied, "great caution should be observed in requesting subpoena authorization from the Attorney General for unpublished information, or where an orthodox First Amendment defense is raised or where a serious claim of confidentiality is alleged."[52]

In neither Caldwell nor Pappas was there any demonstration of proof that the coveted information was of paramount importance on questions of guilt or innocence. Pappas was devoid of any proof that a crime had been committed of which the reporter had any knowledge. Neither case contained evidence of due diligence in attempting to obtain the information from alternative sources.

In Caldwell and Pappas, quite clearly, the first two tests have not been met. However, even where they were met, a further analysis of the situation under investigation is in order. Before we allow infringement of First Amendment rights, we should be convinced

that the investigation has focused on a major crime. This should be the case in view of the serious effect to the flow of news that could result from a reporter's compelled appearance. "If the reporter must testify, he becomes -- and it will be known that reporters have become -- and investigative arm of the government, and he will not again be able to obtain evidence of the crime in confidence."[53]

In all cases a weighing process is involved. Certainly, for the heinous crimes of murder or arson, a compelling need for the testimony should be shown if the other criteria were met. For so-called "victimless" crimes, such as prostitution or abortion, the need for the testimony can never be compelling enough to outweigh the need to protect the confidential relationship. The type of balancing test used in Dennis v. United States[54] is the kind of standard called for here. The court should consider "whether the gravity of the 'evil' discounted by its improbability, justifies such invation of free press as is necessary to avoid the dangers."[55]

> "Although the direct censorship of newspapers or broadcasts would constitute a more blatant -- because historically more familiar and, of course, differently motivated -- violation of the First Amendment, forcing disclosure of reporters' confidences is not very different in effect. It is a form of indirect, and perhaps random, but highly effective censorship...for the forced disclosure fo reporters' confidences will abort the gathering and analysis of news, and thus, of course, restrain its dissemination.

> In the circumstances, only an imperative need to punish or prevent commission of a major crime, if indeed any countervailing consideration at all, can possibly justify inflicting such injury on the vital interests protected by the First Amendment."[56]

III. Conclusion

The public's right to free flow of information under the First Amendment is protected through the reporters' privilege to refuse to rectify as to confidential sources or information, and, concomitantly, to refuse to appear when, by reason of the constitutional protections, such appearance would be a barren performance, which would be of no worth to the grand jury, but which could prejudice the reporter's news gathering capacity. Where First Amendment rights are asserted, the three minimal tests, (proof that the reporter has the needed information; inability to obtain it from alternative sources after efforts with due diligence; and an investigation involving a major crime), must be met before the First Amendment protections are deemed subservient to the Government's power to compel testimony.

ARGUMENT AGAINST THE ALLEGED "NEWSMAN'S PRIVILEGE"

Freedom of the press is one of the most sacred liberties enjoyed by the citizens of our country. It antedates the nation's independence.

In the Caldwell and Pappas cases, the Defendants have urged that the "freedom of the press" clause of the First Amendment affords a protection to all newsmen who are engaged in reportorial activity by providing them with a privilege to refrain from disclosing their sources of information or information secured in confidence when required to reveal them. In both cases, the instrumentality requiring the information was a Grand Jury which was investigating matters preparatory to potential criminal indictments.[57] The defendants employed a similar argument in assertion of the alleged "newsman's privilege."

"The threat that a reporter may have to disclose... confidences has a chilling effect on his relationships with news sources and...could eventually destroy any possibility of a free flow of information."[58]

This allegation is, by admission of counsel for one of the defendant reporters, the "single most compelling" prop butressing the claim of privilege.[59] The advocates of the alleged privilege have, as part of their argument, asserted that the "right to gather news" requires that newsmen be permitted to conceal their sources of information in order to insure that the sources will continue to provide information on a regular basis.

When analyzing the contentions asserted with respect to the alleged privilege, it behooves one to

examine previous cases which have been concerned with the subject. The case which has been regarded as most prominent in the field is Garland v. Torre,[60] which came before the United States Court of Appeals for the Second Circuit fourteen years ago. Judy Garland, the entertainer, had brought an action against the Columbia Broadcasting System, alleging libel based on a defamatory comment in a newspaper column attributed to an unidentified executive of CBS. In order to maintain her cause of action, it became necessary for Miss Garland to establish the identify of the executive. She sought this information by subpoenaing the reporter to whom the alleged defamatory comment was made by the executive. The reporter refused to provide the identity of the executive, claiming a privilege to refuse revelation of the identities of confidential news sources.

In his opinion for a unanimous Court, Judge (now Justice) Stewart wrote:

> "Freedom of the press, hard-won over the centuries by men of courage, is basic to a free society. But basic too are courts of justice, armed with the power to discover the truth. The concept that it is the duty of a witness to testify in a court of law has roots fully as deep in our history as does the guarantee of a free press."[61]

> "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...The Constitution conferred no right (of a newswoman) to refuse an answer"[62]

to a question put forth in the discovery process.

The Court clearly indicated that there is no constitutional newsman's privilege emanating from the First Amendment. Indeed, it has been recognized by several courts that there are limits to the right and privileges which one can claim under the guise of "freedom of the press." "Freedom of the press, precious and vital though it is to a free society is not an absolute."[63]

A newsman's privilege to refuse to disclose his sources of information does not fall within the ambit of the First Amendment. "The language of (the Federal) Constitution is clear, and by no stretch of language can it protect or include under 'freedom of the press' the non-disclosure of sources of information."[64]

In a 1970 federal case in Maryland, District Judge Thompson, writing for the Court, denying an alleged constitutional newsman's privilege, stated that

> "I do not believe that the First Amendment or any other provision of the Constitution or the laws of the United States prevents the Court from compelling representatives of the New York Times to make a limited disclosure of the source or sources of the information they received."[65]

Similarly, Adams v. Associated Press,[66] the United States District Court for the Southern District of Texas, after considering the question of abridgement of freedom of the press under the First Amendment, ruled

that a reporter for the Associated Press had no privilege to refuse to disclose the identity of his confidential source of information.

In another case, involving the alleged newsman's privilege, members of the editorial board of the Philadelphia Bulletin were required by a Grand Jury to produce tape recordings of interviews and conversations with one John J. Fitzpatrick, who was then under investigation by the Grand Jury in connection with criminal charges stemming from alleged bribery and government corruption. Also required were the notes, memoranda, and other documents in possession of the Bulletin which the newspaper had obtained as a result of its confidential relationship with Fitzpatrick. The newsmen refused to comply with the Grand Jury subpoena of these materials and were cited for contempt. The Bulletin then appealed the contempt citations to the Supreme Court of Pennsylvania. Writing for the Court, the Chief Justice of Pennsylvania wrote that "The contention that ...the Constitutionally ordained privilege of freedom of the press encompasses and includes the right of non-disclosure of sources of information is devoid of merit."[67]

It has been recognized by the courts and by legal scholars that the existence of a newsman's privilege would run counter to one of the most basic principles of the American system---that which requires the

cooperation of the citizenry in the pursuit of justice through law. As Chief Justice Hughes states, "One of the duties which the citizen owes to his government is to support the administration of justice by attendind its courts and giving his testimony whenever he is properly summoned."[68]

The legitimate administration of justice is fundamental to the existence of the democratic society. The courts and their agencies must be granted a sufficient breadth of freedom to enable them to function in their most important role in society -- the protection of the public welfare, of the rights of the individual, and of the citizenry at large. The imposition of the purported newsman's privilege would be an obstacle to the proper performance of the courts in their imperative capacity as arbiters of the truth. "One of the chief objections (to newsman's privilege) especially of the courts and the legal profession, to granting such a prerogative to newspapermen is the fear that it will result in weakening the authority of the courts, and in the exclusion of necessary evidence, thus becoming an obstacle to the correct disposal of litigation."[69]

With respect to the alleged First Amendment freedoms, the United States Supreme Court has held that where the greater good in discovery of the truth demands it, the individual must subordinate his rights to those of society. "The personal sacrifice involved (loss of

a First Amendment freedom) is a part of the necessary contribution of the individual to the welfare of the public."[70] In the Caldwell and Pappas cases, the "welfare of the public" demands that Grand Jury investigations into criminal activity directed against the public be given appropriately extensive latitude to discover the truth. Where a confidence comes into conflict with the rights of society, that confidence must yield. Advocates of the privilege have stated correctly that freedom of the press is a right of the public, not of the individual reporter. Certainly, a right of the public should not be perverted so as to defeat a greater right of the public -- that of judicial discovery of the truth.

It has been held that where First Amendment freedoms are challenged, they are not absolute. " D espite the broad scope and protective status of the First Amendment freedoms and privileges, it is clear that none of them is absolute, and that whether, in any given case, an asserted right under that amendment will prevail or not depends upon the particular circumstances involved..."[71]

The Supreme Court has recognized that alleged First Amendment freedoms may come into conflict with valid governmental functions, which in the case of Grand Jury investigations, are authorized by the Fifth Amendment.[72] "Whenever these (First Amendment) constitutional

protections are asserted against the exercise of valid governmental powers, a reconciliation must be effected, and that perforce requires an appropriate weighing of the respective interests involved."[73]

However, before there can be a weighing process, there must first be a determination that a First Amendment protection would avail to the news reporter in the establishment of a privilege of non-disclosure of confidential information and sources.

As previously noted, the news media alleges the "freedom of the press" defense on the following bases:

(1) Gathering of the news is a constitutionally protected right of reporters. To compel disclosure of news sources would cause the sources to refrain from future communication with the reporters from fear of reprisals or punishment and would have a "chilling" effect on the ability of the reporter to gather news;

(2) The gathering of news is essential to the free flow of information to the public. Any impediment, whether direct or indirect, on the ability of the press to gather news results in a consequent "trammeling" to the free flow of information to the public;

(3) To reveal the sources of information would be a breach of promise and a violation of the conditions by which the reporter was granted access to the source.

As to the third argument above, one of the reporter's risks of his profession is that if he permits

himself to enter into a confidential relationship in obtaining information, he must be prepared to suffer the consequences of maintaining the confidence in the face of legitimate orders to reveal the source. "The mere fact that a communication is made in confidence, express or implied, does not of itself create a privilege."[74] The courts are under no obligation to respect a confidence where that confidence jeopardizes the discovery of the truth.

With respect to the contention concerning the gathering of news as a constitutionally protected activity, the Court of Appeals for the Fifth Circuit recognized that even if news gathering was protected by the First Amendment (and this was only assumed arguendo by the Court) it is not unconditional.[75] There are definite limits on the right to gather news. In the case of In re Goodfader's Appeal[76] the Supreme Court of Hawaii admitted that there would be "disadvantages to a news reporter" where sources had been revealed against a pledge that they would remain in confidence, but that these disadvantages, such as in future communication with the sources, do not give rise to a claim for impairment of constitutional rights.

The contention that the free flow of information to the public would be impaired by a failure to impose a reporter's privilege of non-disclosure is without merit. "(T)he contention that a denial of immunity

from compulsory disclosure will destroy many sources of news, or weaken the relationship between newspapermen and their informants in a very questionable reason for according a privilege between confidential informers and newspapermen...such information can often be gathered despite the fact that communications between newspapermen and their informers remain unprivileged."[77] Indeed, at common law there was no privilege and only recently have a minority of the States enacted statutes creating such a privilege.[78] A majority of the States have rejected the privilege, as has the Congress of the United States. Yet, during the history of our nation, despite the lack of a newsman's privilege, the news has been gathered and disseminated to the public. The flow of information has not been impeded. There has been a dearth of cases brought by newsmen on the privilege question, indicative in itself of the fact that the lack of a privilege has not been an obstacle to the reporter's ability to gather the news.

In recent years, however, members of the news media have argued vigorously for the establishment of a privilege. The evidence indicates that the advocacy of the privilege is in no way connected with a concern with impairment of news gathering.

"While it is familiarly argued that the gathering and dissemination of news are inseparable parts of the same publishing process, it hardly follows logically therefrom that the denial of a constitutionally-protected right of non-disclosure of the identity of news sources effectively impairs the free flow of news from source to public."[79]

There is no need for a privilege of non-disclosure even on the bases asserted by the Defendants in the Caldwell and Pappas cases, either to protect a First Amendment freedom or as a logical extension of public policy.

> The contention of the media that they are acting in the public interest in espousal of a non-disclosure doctrine, has been refuted: "Claims of a protected source privilege are not in reality based on the public interest in the free flow of information, but rather on the interest of a limited number of individuals in a certain occupational group in avoiding imprisonment or payment of fines when held in contempt of court for refusal to identify news sources. Such finds and imprisonment are, in effect, but risks of a particular trade and costs of doing business therein."[80]

Thus the effort by the news media to gain a non-disclosure privilege is seen not in terms of advancing First Amendment freedoms, but of furthering the business objectives of a specialized industry in promoting its own economic and vocational goals. In parading as paladins of the public's right to information in their efforts to gain the privilege, the powerful news media

has attempted to prostitute the Constitution to its own desires.

> "The real danger and significance of the recent case decisions where freedom of the press has been invoked as a basis for a reporter's non-disclosure of the identity of sources lies in the tacit judicial recognition of some validity of the proposal. By stating hypothetically that compelled disclosure of news sources entails some abridgement of freedom of the press in limiting the availability of the news, the door is opened to allowing undue extensions of the freedom of the press guarantee to accomplish primarily economic aims of a powerful occupational group to the detriment of the public generally, when resulting in an effective denial of the orderly administration of justice. Recognition of the necessity of a free and informative press in a democratic society is unchallenged. Discrimination in favor of news media as a certain private enterprise segment of society presents markedly different questions."[81]

It is thus perceived in actuality that the freedom of the press is completely removed as a basis for any newsman's privilege. Not only has it been rejected by the courts as a right deriving from the First Amendment, but it appears from the evidence produced by the legal writers that the privilege or lack of it has no noticeable effect on the free flow of information from news sources to the public, and that the privilege has been asserted merely as a device by the news media to achieve its own business objectives.

Thus, as the First Amendment is not truly involved, arguments put forth by the news media that the decision in New York Times v. Sullivan[82] would support a

privilege of non-disclosure are completely spurious. The conditions which the Times decision was concerned with are not present in the Caldwell and Pappas cases. Therefore, no comment is necessary on the merits of the media's contentions concerning the Times decision except to note that even if First Amendment rights were involved in the newsman's privilege, the Times decision would not compel recognition of such a privilege.

One additional argument against the establishment of the newsman's privilege has been asserted in State v. Buchanan.[83] The Supreme Court of Oregon, sitting En Banc, declared that "the only issue is whether freedom of the press gives the reporter a constitutional right to preserve the anonymity of an informer in the face of a court order requiring disclosure."[84] The issue arose upon a court order in aid of a Grand Jury investigation into the use of marijuana in Lane County, Oregon.[85] The defendant news reporter had promised seven persons that if they permitted her to interview them for publication, she would under no circumstances reveal their identities.[86]

In striking down the alleged constitutional privilege, the Court held that

> "it would be difficult to rationalize a rule that would create special constitutional rights for those possessing credentials as news gatherers which would not conflict with the equal privileges and equal protection concepts also found in the Constitution. Freedom

> of the press is a right which belongs to the public; it is not the private preserve of those who possess the implements of publishing."[87] (Emphasis added.)

"There is no more infringment of constitutional rights in compelling a newsman to disclose the sources of his information than there is in compelling any other person to make a disclosure. No limitation whatever on the right to publish is imposed."[88]

"We hold that there is no constitutional reason for creating a qualified right for some, but not for others, to withhold evidence as an aid to newsgathering ...nothing in the...federal constitution compels the courts, in the absence of a statute, to recognize such a privilege."[89]

The Court here saw the investing of one class with the constitutional status of privilege while denying the privilege to less favored classes as a denial of equal protection of the laws. Thus, a privilege of non-disclosure extended to one class would have to be extended to all classes of persons in order to satisfy the equal protection clause of the Constitution. This, assuredly, would result in the total inability of the judicial system to function, as testimony would be restricted to the point where the discovery process would become a simulacrum and justice would be denied to the public. Thus, a basic pillar of an orderly democratic society -- the ability of the courts to

freely adjudicate cases and controversies before them --would be destroyed.

In In re Goodfader's Appeal, the Court noted that in Burdick v. United States,[90] the Supreme Court upheld the right of an editor to refuse to reveal his news sources. However, the right was asserted under the Fifth Amendment, not the First. The importance of this distinction is revealed in Barenblatt v. United States,[91] in which the Court stated that although the Fifth Amendment affords the witness the right to refuse inquiry, protections under the First Amendment do not give witnesses that automatic right. There is no automatic privilege to refuse to answer questions put forth by an agency of the Government under the First Amendment.

In summary, there is no First Amendment constitutional right to refuse to answer questions respecting sources of information.[92] The leading cases on newsman's privilege, Garland v. Torre and In re Goodfader's Appeal held that "the public interest in the adjudication of disputes outweighed any private rights of newsmen."[93] There are no legitimate First Amendment Rights which are sought to be protected by the imposition of the newsman's privilege, only the private designs of a specialized industry whose power rivals that of the Government. The interests of society in the administration of justice take absolute precedence

where there is no countervailing constitutional freedom which is required to be upheld.

One should agree with the Court in Pappas that "the opinion in the Caldwell case largely disregards important interests of the Federal government and the several States in enforcement of the criminal law for the benefit of the general public."[94] The Caldwell decision should be considered to be a judicial aberration.

There also appear to be serious questions as to whether a newsman's privilege would be in keeping with the Equal Protection clause of the Fourteenth Amendment. This would apply not only to the alleged constitutional privilege, but also to those granted by statute in a number of States.

> "To recognize the (newsman's) privilege asserted here...would poorly serve the cause of justice."[95]

Any right to refuse testimony with respect to sources of information should arise in the traditional manner, in the presiding judge's exercise of supervision over the Grand Jury, where he has the discretion "to prevent excessive or unnecessary interference with the legitimate interests of witnesses, e.g. by too broad subpoenas."[96]

The role of the press is to search out the truth; such is also the function of the Grand Jury. The two

institutions, therefore, are not incompatible. Whenever the truth is suppressed, no matter under what guise, freedom must suffer. Freedom of the press demands revelation of the truth. For the press to suppress the truth under the guise of privilege is to stifle the very constitutional guarantees which allow the press to function.

FOOTNOTES

1. 8 Wigmore, Evidence, §2286 (McNaughton rev. 1961).

2. Id. at §§2190-2192.

3. Id. at §2192.

4. NOTE, Reporters and their Sources: The Constitutional Right to a Confidential Relationship, 80 Yale L.J. 317 at 319 (1970).

5. Shillitani v. United States, 384 U.S. 364 at 370 (1966); also Blair v. United States, 250 U.S. 273 (1919).

6. Barenblatt v. United States, 360 U.S. 109 (1959).

7. Hale v. Henkel, 201 U.S. 43 at 59 (1906).

8. Blair v. United States, supra at 282; see also United States v. Flood, 394 F.2d 139 (2 Cir. (1968).

9. NOTE, Caldwell v. United States - Journalistic Privilege: A New Dimension to Freedom of the Press, 37 Brook. L. Rev. 502 at 503-504 (1971).

10. Id. at 505.

11. Brewster v. Boston Herald-Traveler, 20 F.R.D. 416 (D.C. Mass., 1957) says at 417 that the court "found no case in American jurisdictions granting such a privilege."

12. Caldwell v. United States, 311 F.Supp. 358 (1970), 434 F.2d 1081 and People v. Dohrn, Crim. No. 69-3808, a case decided by the Cook County Circuit Court, Chicago, Illinois.

13. In re Caldwell, 311 F.Supp. 358 at 361 (1970).

14. Id. at 362.

15. Caldwell v. United States, 434 F.2d 1081 (9 Cir. 1970).

16. Caldwell v. United States, supra at 1084.

17. Id. at 1089.

18. NOTE, Freedom of the Press - Reporter has a First Amendment Right to Refuse to Appear and Testify Before Grand Jury About Confidential Sources and Information, 84 Harv. L. Rev. 1536 at 1545 (1971).

19. 266 N.E. 2d 297.

20. Brief for Petitioner at 5,6, In re Pappas, No. 70-94.

21. In re Pappas, 266 N.E. 2d 297 at 302 (1971).

22. In re Pappas, supra at 302.

23. 37 Brook. L. Rev. 502 at 522, quoting Caldwell v. United States, supra at 1089.

24. Time v. Hill, 385 U.S. 374 at 397 (1967), citing Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-502 (1952).

25. 385 U.S. 374 at 389 (1966).

26. Guest and Stanzler, The Constitutional Argument for Concealing Their Sources, 64 Nw. U.L. Rev. 18 at 28 (1969).

27. 395 U.S. 367 at 390 (1969).

28. Brief of the New York Times, et. al. as amici curiae at 16, United States v. Caldwell, No. 70-57.

29. Associated Press v. United States, 326 U.S. 1, 20 (1945).

30. New York Times v. Sullivan, 376 U.S. 254 (1964).

31. Guest and Stanzler, supra.

32. Bantam Books, Inc. v. Sullivan, 552 U.S. 58, 70 (1963); see also Speiser v. Randall, 357 U.S. 513, 520 (1958).

33. Bridges v. California, 314 U.S. 252, 265 (1941).

34. Caldwell v. United States, 434 F.2d at 1086.

35. NOTE, Constitutional Law - Journalist-Informant Privilege--The Government Must Demonstrate a Compelling Need for a Journalist's Presence at Secret Grand Jury Proceedings Before His Presence

Can Be Required, 49 Tex. L. Rev. 808 at 811 (1971).

36. Guest and Stanzler, supra at 43-44.

37. Goldstein, "Newsmen and Their Sources," New Republic, 21 March 1970 at 13-14.

38. Reporters and Their Sources, 80 Yale L.J. 317 at 332 (1970).

39. Id. at 336.

40. N.A.A.C.P. v. Button, 371 U.S. 415 at 433 (1963).

41. 80 Yale L.J. at 338.

42. 39 U.S.L.W. at 2111.

43. 434 F.2d at 1084.

44. Brief of the New York Times, supra at 24.

45. Bantam Books, Inc. v. Sullivan, 372 U.S. 58 at 66 (1963).

46. Id.

47. Brief of the New York Times, supra at 28.

48. Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 at 557 (1963).

49. 311 F. Supp. at 360.

50. 80 Yale L.J. 317 at 364 (1970).

51. Id.

52. Brief of The New York Times, supra at 49-50.

53. Brief of The New York Times, supra at 57.

54. 341 U.S. 494 (1951).

55. Id. at 510.

56. Brief of The New York Times, supra at 64.

57. The Court in Caldwell v. United States, 434 F.2d 1081 at 1082 (9 Cir. 1970) admits that the Grand Jury had subpoenaed Caldwell and his records in line with an investigation into criminal activity by the Black Panthers, contrary to federal law. In Pappas, 266 N.E. 2d 297 at 299 (1971), the Court, though the record was meager on the point, assumed that the Grand Jury was engaged in an appropriate investigation of possible criminal activity by the Black Panthers, in contravention of Massachusetts law.

58. Brief for Petitioner at 11, In re Pappas, No. 70-94; Appendix in United States v. Caldwell, No. 70-57, p. 27.

59. Brief for Petitioner, In re Pappas, supra.

60. 259 F.2d 545 (2d Cir.), cert. denied 358 U.S. 910 (1958).

61. Id. at 548.

62. Id. at 549-550.

63. Id. at 548.

64. In re Taylor, 183 A.2d 181 at 184 (1963).

65. In re Grand Jury, January 1969, 315 F. Supp. 681 (1970).

66. 46 F.R.D. 439 (1969).

67. In re Taylor, 183 A.2d 181 at 184 (1963).

68. Blackmer v. United States, 284 U.S. 421 at 438 (1932).

69. 45 Yale L. J. 357 at 360 (1935).

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

71. In re Goodfader's Appeal, 367 P.2d 472 at 478 (1961).

72. U.S. Const. amend V. "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury..."

73. Konigsberg v. State Bar of California, 366 U.S. 36 at 51 (1961).

74. Morris v. Avallone, Del. Duper, 272 A.2d 344 at 347 (1970), denying an alleged newsman's privilege of non-disclosure.

75. Seymour v. United States, 373 F.2d 629 at 632 (5 Cir. 1967).

76. 367 P.2d 472 at 479 (1961).

77. 45 Yale L. J., supra.

78. The earliest statute was enacted in 1953, with the bulk having been enacted in the past six years.

79. 61 Mich. L. Rev., 184 at 189; cf. 54 Nw. U. L. Rev. 243 at 247 (1959).

80. 61 Mich. L. Rev., supra at 190.

81. 61 Mich. L. Rev., supra at 190.

82. 376 U.S. 254 (1964).

83. 436 P.2d 729 (1968).

84. Id.

85. Id. at 730.

86. Id.

87. Id. at 731.

88. In re Goodfader's Appeal, supra. at 480.

89. State v. Buchanan, supra. at 732.

90. 236 U.S. 79 (1915).

91. 360 U.S. 124 at 126 (1959).

92. In re Goodfader's Appeal, supra. at 480.

93. 46 Or. L. Rev. 100 (1966).

94. In re Pappas, 266 N.E. 2d 297 at 302 (1971).

95. Garland v. Torre, supra. at 550.

96. In re Pappas, supra. at 303.