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Constitutional Law - Freedom of the Press - First Amendment Right of a Newsman Not to Reveal Confidential Information

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Recent Decisions

CONSTITUTIONAL LAW—FREEDOM OF THE PRESS—FIRST AMENDMENT RIGHT OF A NEWSMAN NOT TO REVEAL CONFIDENTIAL INFORMATION—United States District Court for the Northern District of California has held that a newspaper reporter called before a grand jury would not be required to reveal confidential associations, sources, or information that impinge upon the effective exercise of his First Amendment right to gather news for dissemination until such time as a compelling and overriding national interest which cannot be alternatively served has been established to the satisfaction of the court.

Application of Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970).

Earl Caldwell, a full time staff reporter for The New York Times, and his publisher moved to quash or limit a Federal Grand Jury subpoena summoning the reporter to appear and testify relative to his interviews with officers and spokesmen of the Black Panther Party. The movants asserted that the interviews were confidential and within the scope of a relationship of trust maintained by Caldwell as a professional journalist with members of the Panther Party. They contended that under the circumstances the contents of the interviews were protected against compulsory disclosure by the First Amendment[1] and that the compelled appearance of Caldwell before the grand jury would "have a drastic chilling and repressive effect on First Amendment freedoms."[2]

The district court held that Caldwell must respond to the subpoena and testify.[3] However, it also held that, on the facts of the case, he was entitled to a protective order limiting the scope of his grand jury testimony. Subject to modification, he was protected from being com-

1. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I.
2. 311 F. Supp. at 360.
3. Grand jury testimony is absolutely compulsory. All validly subpoenaed witnesses must appear, must be sworn, and must testify. The only ground acceptable to federal courts for a refusal by a grand jury witness to answer a question is some claim of privilege. Before the grand jury, there are no technical or procedural objections as to hearsay, competancy, materiality, or even jurisdiction. Additionally, the witness is not permitted to have his counsel present while he is testifying. In short, a witness before a grand jury who cannot claim self-incrimination or some other privilege has but one legal course of action: he must answer each question truthfully and to the best of his ability. See the excellent article Silverstein, *Federal Grand Jury Testimony and the Fifth Amendment*, 1960 WASH. U.L. REV. 215, 216-17 (1960).

pelled to disclose information received as a journalist through confidential relationships developed for the purpose of gathering news. This is the first case to hold that there exists a constitutionally protected right of a member of the press to refuse to disclose confidential sources of information.[4]

The opinion in the instant case first pointed out that the issues presented went to the very core of the First Amendment in the area of freedom of the press and the scope of the journalist's privilege,[5] issues which the Supreme Court of the United States has not fully explored and decided.[6] The court, in ordering that the reporter need not reveal confidential associations that impinge upon the effective exercise of his First Amendment right to gather news,[7] merely assumed that there is a First Amendment right to gather news, as distinguished from publishing or disseminating news. The existence and the extent of a constitutionally protected right of the press to gather news remains judicially unsettled. There has been no definitive Supreme Court ruling on this point.[8]

In the court's protective order,[9] the following findings of fact were made : the testimony sought from Mr. Caldwell concerned information about the Black Panther Party which he had obtained through confi-

4. In arriving at this decision, the court cited no authority but rather relied on assumptions of law and findings of fact.

5. Briefly stated, the "journalist's privilege" is the aasserted right of a journalist, news man, or reporter to refuse to disclose the source of his information when asked to do so during a judicial proceeding, such as when testifying before a grand jury or at a trial, in answering interrogatories, or when being deposed.

6. The constitutional question of a journalist's privilege based on the First Amendment has never been considered by the Supreme Court. In Garland v. Torre, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958), the very first case in which the claim of privilege was constitutionally based, the Supreme Court declined review. This same constitutional issue was raised in an unreported Colorado case, *In re Murphy*, wherein a reporter was held in contempt for refusing to disclose her confidential source of news. But again, certiorari was denied. Murphy v. Colorado, 365 U.S. 843 (1961). *See In re* Goodfader's Appeal, 367 P.2d 472, 479 n. 3, 498 (Hawaii 1961). State v. Buchanan, 436 P.2d 729 (Ore.), *cert. denied*, 392 U.S. 905 (1968), was the last case in which the claim of a constitutional right by a reporter not to disclose was raised. Here again the Supreme Court declined review.

7. To assure the effectuation of the journalist's privilege it "created," the court's order permitted the reporter to consult with his counsel at any time during his appearance before the grand jury. Normally, a witness before the grand jury is left to his own devices in raising a claim of privilege, even that of self-incrimination. This is due to the fact that only the members of the grand jury, the prosecuting attorney, the witness then testifying, and a stenographer are permitted to be present in the grand jury room during the taking of testimony. *See Federal Grand Jury Testimony, supra* note 3. It is well settled that a witness before an investigatory body such as a grand jury has no constitutional right to be represented by counsel. National Land & Investment Co. v. Specter, 304 F. Supp. 1004 (E.D. Pa. 1969).

8. *See* Note, *Right of News Media Personnel to Refuse to Disclose Confidential Sources of Information*, 61 MICH. L. REV. 184, 186-89 & nn. 12-23 (1962).

9. 311 F. Supp. at 361-62.

dential relationships which he had developed as a professional journalist; that these confidential relationships are indispensable in gathering and publishing the news ; that compelled disclosure of this information would jeopardize those relationships and impair his ability to gather and publish the news;[10] and that the Government had shown no compelling or overriding interest in requiring his testimony.[11] Simply stated, having assumed that there is a constitutional right to gather news, and, having found as a fact that forced disclosure of confidential information would impair this right, the court decided to protect the right until some national interest should require its nullification.

At common law there clearly was no privilege by which a journalist could refuse to disclose confidential information for use as evidence.[12] The state courts have uniformly held that, in the absence of a statute,[13] journalists have no privilege to conceal their source of information.[14] However, these state courts, until quite recently never considered a constitutional claim of privilege.[15] The early claims of a

10. The court here assumed that the reporter would have testified, as to the confidential information he had received, in the absence of a protection order. *But see* note 16 *infra; see Author's Note infra.*

11. This was apparently an unconscious application of the "balancing test" discussed further on in this case note.

12. *See* Beaver, *The Newsman's Code, The Claim of Privilege and Everyman's Right to Evidence*, 47 ORE. L. REV. 243, 246 & n. 7 (1968), *citing* Annot., 102 A.L.R. 771 (1936), Annot., 7 A.L.R. 3d 591 (1966); 8 WIGMORE, EVIDENCE § 2286 (McNaughton rev. 1961). Numerous unreported cases are collected in the comprehensive 1949 *New York Law Revision Commission Report* 23-168. *See also* W. ARTHUR and R. CROSSMAN, THE LAW OF NEWSPAPERS 257-59 (1940); Note, *The Right of a Newspaper to Refrain from Divulging the Sources of His Information*, 36 VA. L. REV. 61 (1950); Note, *supra* note 8, at 184-85 & n. 4. For a small and curious English common law exception exempting a newspaper publisher from disclosing the identity of his informant during discovery in libel actions where the question of malice or fair comment is in issue, see Carter, *The Journalist, His Informant and Testimonial Privilege*, 35 N.Y.U.L. REV. 1111 (1960).

13. At present thirteen states (Alabama, Arizona, Arkansas, California, Indiana, Kentucky, Louisiana, Maryland, Michigan, Montana, New Jersey, Ohio, and Pennsylvania) have legislation which creates a statutory right of newsmen to reveal the contents of a communication without being required to reveal its source. *See* State v. Buchanan, 436 P.2d at 732 n. 17. For a table illustrating the scope of the twelve privilege statutes then in existence (Louisiana has the newest), see Note, *The Journalist and His Confidential Source: Should a Testimonial Privilege Be Allowed*, 35 NEB. L. REV. 562, 564-66 n. 10 (1956). Most of the privilege statutes are closely patterned after the Maryland law, adopted in 1896, which was the first. For a discussion of the scope of these statutes, see *The Right of a Newsman, supra* note 12. These statutes are criticized as being to broad since, once a journalist qualifies within the mechanical definitions of the statute, he usually has the *absolute* right to refuse to identify his source, should he so choose.

14. People *ex rel.* Mooney v. Sheriff of N.Y. County, 269 N.Y. 291, 199 N.E. 415, 102 A.L.R. 769 (1936); Plunkett v. Hamilton, 136 Ga. 72, 70 S.E. 781 (1911); Clein v. State, 52 So.2d 117 (Fla. 1950); *Ex parte* Lawrence, 116 Cal. 298, 48 Pac. 124 (1897).

15. The one exception is Burdick v. United States, 236 U.S. 79 (1915), *reversing* 211 Fed. 492 (S.D. N.Y. 1914) (L. Hand, J.), the only case wherein a court has upheld the right of an editor to refuse to reveal his source of information upon a claim against self-incrimination asserted under the Fifth Amendment. Burdick had published a series

privilege not to disclose sources were usually evidentiary ones based upon an assertion of honor, an assertion of confidence, or an assertion of the journalist's code of ethics.[16] None of these have been accepted by the courts. As was stated in *Plunkett v. Hamilton*:[17]

> In the early English practice it was not uncommon for a person to claim a privilege against answering a question, on the ground that he had received the information in confidence and had pledged himself not to divulge it. This claim, which was sometimes called the "point of honor," was considered and overruled in 1776 in the Duchess of Kingston's Case, 20 How. St. Tr. 586, and again in 1777 in Hill's Trial, 20 How St. Tr. 1362. Professor Wigmore states that "the 'point of honor' thus disappeared forever as a motive for recognizing a privilege."[18]

However, the status of the journalist's privilege at common law cannot be used as authority in determining whether such a privilege should or should not be held to exist in the United States under our First Amendment at the present time.

> That this historical contention is dubious has been persuasively argued elsewhere . . . . [O]ne of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press . . . .[19]
>
> . . . "[T]he state of the press * * * under the common law, cannot * * * be the standard of its freedom in the United States."[20]

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of stories about customs fraud, was summoned before a grand jury, but refused to reveal his sources on the ground of self-incrimination. This was obviously a subterfuge, because he wouldn't have exposed a situation in which he himself was criminally involved. It is interesting to note that Burdick's claim of possible incrimination was accepted at the grand jury level. The only issue on appeal was the effect of his refusal to accept a full and unconditional pardon signed by President Woodrow Wilson. The case turned on an error committed by the United States Attorney. Had Burdick been granted immunity from prosecution rather than a pardon, he could have been compelled to testify or be held in contempt of court for refusal to do so.

16. The CODE OF ETHICS OF THE AMERICAN NEWSPAPER GUIDE, adopted in 1934, states: "Newspapermen shall refuse to reveal confidences or disclose sources of confidential information in court or before judicial or investigating bodies . . . " Judicial comment on this canon has been to the effect that, though it is worthy of respect and well-founded, it is subject to the qualification that it must yield to the interests of justice. *In re* Wayne, 4 Hawaii 475, 476 (D.C. 1914).

17. 136 Ga. —, 70 S.E. 781, 785 (1911).

18. The court in *In re* Wayne, 4 Hawaii 475, 477 (D.C. 1914), also citing 4 WIGMORE, EVIDENCE § 2286, at 3186-87, said:

> In general, the mere fact that a communication was made in express confidence, or in the implied confidence of a confidential relation, does not create a privilege. This rule is not questioned to-day [*sic*]. No pledge of privacy, nor oath of secrecy, can avail against demand for the truth in a court of justice.

This has come about by the adoption of the legal maxim, as worded by Lord Hardwicke, that "the public has a right to every man's evidence." *In re Wayne, supra* at 477.

19. Bridges v. California, 314 U.S. 252, 264 (1941).

20. *Id., quoting from* VI WRITINGS OF JAMES MADISON 1790-1802, 387.

Though ". . . the First Amendment has the power of growing to meet new needs. . . ,"[21] it is subject to the qualification that freedom of the press is not an absolute right.[22] In deciding upon the extent to which a journalist's privilege will be given protection, once it is ascertained that there exists a constitutional basis for such a privilege, a "balancing test" should be applied to weigh the personal constitutional rights against the rights of the public. Here there is the conflict of the communicational freedoms with the public interest in the fair administration of justice.[23] Under the balancing test, "the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented."[24]

In *Garland v. Torre*,[25] the leading case concerning a newspaperman's constitutional privilege to withhold sources, such a test was unconsciously applied. In that case actress Judy Garland was suing Columbia Broadcasting System for breach of contract and for false and defamatory statements allegedly made by a CBS executive and published by columnist Marie Torre, who refused to identify her source during a deposition. Upon her refusal to name the executive in court, she was held in criminal contempt.[26] It should be stressed that on review the court of appeals

> accept[ed] at the outset the hypothesis that compulsory disclosure of a journalist's confidential sources of information may entail an abridgment of press freedom by imposing some limitation on the availability of news.[27]

However, the question asked of Torre went to the heart of Garland's case, and the information sought could not reasonably be obtained by other means. Although the court assumed that there was a First Amendment basis for a journalist's privilege, it applied a balancing

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21. Chafee, *Book Review* (of Meiklejohn's FREE SPEECH), 62 HARV. L. REV. 891, 898 (1949).
22. Near v. Minnesota, 283 U.S. 697 (1930); Konigsberg v. State Bar, 366 U.S. 36 (1961).
23. *See* Note, *Constitutional Law: Privilege of Newsman to Conceal Source of Information*, 15 OKLA. L. REV. 453, 454 (1962).
24. American Communications Ass'n v. Douds, 339 U.S. 382, 399 (1950).
25. 259 F.2d 545 (2d Cir. 1958). *See* note 6 *supra*.
26. Being held in civil contempt can result in summary confinement of the witness until such time as he agrees to abide by the court's order and answer the question asked, or until the term of the grand jury expires if the contempt citation is a result of refusing to answer the grand jury. A criminal contempt conviction is the basis for a specific sentence, either confinement for a definite period or a fine or both. *See Federal Grand Jury Testimony*, *supra* note 3, at 236. Miss Torre was sentenced to confinement for ten days.
27. Garland v. Torre, 259 F.2d at 548.

test and found that the interests of justice outweighed the encroachment on freedom of the press.

The next case in which the constitutional question of a journalist's privilege arose was *In re Goodfader's Appeal*.[28] A former personnel director instituted an action against the members of a civil service commission for her reinstatement, alleging that her ouster was arbitrary and illegal. The basis of her complaint was that three of the commission members had secretly contrived and agreed to fire her without notice. A reporter, who had been present at the commission meeting dismissing the plaintiff, stated during his deposition that he had received prior confidential information that an attempt to fire her would be made. The court considered it likely that whoever had given the reporter this information had information traceable to one of the commissioners voting for her ouster. However, the reporter refused to reveal his source. In affirming the order compelling disclosure, the Supreme Court of Hawaii stated that

> in the absence of any authoritative ruling by the [United States Supreme Court], we will assume, for the purposes of this case, that the forced disclosure of a reporter's confidential source of information may, to some extent, constitute an impairment of the freedom of the press.[29]

To justify the impairment the court said it felt that the information sought was sufficiently important and that the plaintiff had made a sufficient attempt to obtain this information elsewhere.[30] The individual interest involved had been weighed against the public interest affected.[31] Upon the facts the balance favored the latter—the proper administration of justice.

The last case prior to the instant one in which the constitutional issue was raised was *State v. Buchanan*.[32] A writer for a student newspaper had promised seven marijuana users that she would not reveal their identities if they would permit her to interview them for publication. She refused to reveal their names to a grand jury investigating the problem and was given a $300 contempt fine. On appeal the Supreme Court of Oregon affirmed the contempt citation, basing its decision on an equal-protection argument and the absence of a statute granting a

28. 45 Hawaii 317, 367 P.2d 472 (1961).
29. *Id.* at 329, 367 P.2d at 480.
30. *Id.* at 339, 367 P.2d at 485.
31. *Id.* at 325, 367 P.2d at 478.
32. 436 P.2d 729 (Ore. 1968). *See* note 6 *supra.*

journalistic privilege. The court argued that it would be violating equal-protection concepts of the constitution if it created a special privilege for news gatherers possessing credentials while denying it to other persons. This argument was presented without realizing that the press is the one industry specifically selected for protection by the Constitution. The court was also more concerned with the problem of determining who would possess the privilege than with determining the existence of the privilege itself. The decision cited *Garland* and *Goodfader*, but only insofar as those cases rejected the old evidentiary claims of privilege. *Buchanan* did not recognize the modern trend toward accepting the existence of a First Amendment privilege and then applying a balancing test on the facts. Rather, it held that nothing in the state or federal constitution compelled the court, in the absence of statute, to recognize such a privilege.

Caldwell is directly in line with the modern trend. It recognized a qualified First Amendment right not to disclose a newsman's source. It balanced this right as weighted by the facts against the government's interest in obtaining the information. It was the first decision to find that the balance fell in favor of supporting the qualified journalist's privilege. As a practical matter, however, the effects of an absolute journalist's privilege have existed for some time. By virtue of the newsman's code, the identity of the informant is almost never revealed.[33] The existence or non-existence of the privilege would seem to have little effect then on the due administration of justice.[34] While it is not valid to argue that a privilege should exist in the law because it exists in effect, the only possible remaining purpose of a limited journalist's privilege is to protect the newsman from what is popularly considered to be judicial abuse when he refuses to violate his code.[35]

The guidelines issued by Attorney General John Mitchell for Justice Department use in subpoenaing newsmen[36] directly paralleled

33. *The Newsman's Code, supra* note 12, at 252. Only two cases have been discovered in which reporters have revealed their sources after being cited for contempt. After the court in *In re* Wayne, 4 Hawaii 475, 478 note (D.C. 1914), had made its opinion (*supra* note 18), Mr. Wayne immediately purged himself of any possible contempt by not only giving the desired information but by producing his informant as a witness before the grand jury. In the case Eddie Barr (unreported), N.Y. Times, March 13, 1931, p. 25, col. 8, the commitment was of indefinite duration, the reporter to be released when he purged himself by answering the question. Because of the possibility of unlimited imprisonment, Barr answered. *The Right of a Newsman, supra* note 12, at 62 n. 9.

34. *The Journalist and His confidential Source, supra* note 13, at 578.

35. *The Right of a Newsman, supra* note 12, at 83. It was public reaction to the courts' making of martyrs of members of the Fourth Estate that caused many states to adopt their privilege statutes.

36. Pittsburgh Post-Gazette, Aug. 17, 1970, at 8, col. 1.

the rule announced in *Caldwell.* The guidelines note that the use of compulsory process against journalists may have a chilling effect on the exercise of First Amendment rights. They provide that the information sought must be essential to a successful investigation and that an attempt should first have been made to obtain the information from other sources. It is submitted that, due to this judicial and executive recognition, the First Amendment may now be used by a newsman to protect himself from forced disclosures which are only possibly relevant and are not of sufficient value to justify the possible deterrent to the gathering of news. However, where the information sought from the reporter is essential and can be obtained only from him, and where a national interest has been shown in its procurement, the freedom of the press right must yield to the administration of justice even if it results in the reporter losing some of his sources of information.

[*Author's Note*: In the above noted case, Caldwell had moved to quash the subpoena. The district court had denied that motion and directed compliance with the supoena subject to the protective order. Caldwell appealed that decision. The appeal was dismissed apparently on the ground that the order was not appealable. Caldwell's disregard of the order requiring his attendance at the grand jury resulted in a judgment of contempt, from which he appealed. This is all reported in *Caldwell v. United States,*[37] which was decided subsequent to the completion of this case note. The issue on appeal there was not the scope of the interrogation to which he must submit but whether he need attend at all. In reversing his contempt citation and in vacating the order requiring his attendance, the circuit court agreed with the district court that the First Amendment requires a qualified journalist's privilege. However, the court went further and found that mere attendance cannot be required unless the Government demonstrates a compelling need for the witness's presence prior to the issuance of the subpoena.[38] The court reasoned that, when a reporter is called to testify behind closed doors, the secrecy that surrounds grand jury testimony necessarily introduces uncertainty into the minds of those who fear a betrayal of their confidences. This anticipated loss of future communication fell under the protection of the public's First Amend-

37. No. 26,025 (9th Cir. Nov. 16, 1970).
38. The customary procedure is to require the witness to seek a protective order after appearing before the grand jury.

ment right to be informed. It was noted in the case that the Government, while not conceding the validity or propriety of the qualified privilege granted Caldwell, did not seek review of the district court's protective order due to the Justice Department guidelines issued subsequent to that order.]

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LABOR LAW—NLRB's REMEDIAL POWERS—The United States Supreme Court held that while the National Labor Relations Board does have power under the Labor Management Relations Act to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement.

H. K. Porter Co. v. NLRB, 397 U. S. 99 (1970).

Section 8(d) of the National Labor Relations Act, as amended,[1] provides:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .

On October 5, 1961, the United Steelworkers of America was certified by the NLRB as the bargaining representative of the approximately 300 production and maintenance employees of the H. K. Porter Company's Danville, Virginia plant. As of September, 1964, the union had sought and received one bargaining order against the employer[2] but no contract had yet been concluded between the parties. The three unresolved issues as of this date were wages, health insurance and "checkoff," the deduction by the employer of union dues from the paychecks of employees who authorized such a deduction. The 300 employees comprising the bargaining unit lived within a radius of 35 to 40 miles of the plant. Since the union had no clerical staff in Danville and its closest office was in Roanoke, approximately 85 miles away, it

1. Labor Management Relations Act (Taft-Hartley Act), 29 U.S.C. 151 (1947).
2. H. K. Porter Co., 56 L.R.R.M. 1016 (1964).