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# Confidential Sources And Telephone Records

The News Business

The press received another sharp judicial jab last month in the vital area of protection of confidential sources. It was in the form of a U.S. Court of Appeals decision that attracted little public attention.

Certainly the ruling lacked both the drama and the overall importance of the Myron Farber case. But it deserves more than a footnote in the expanding chronicles of anti-press actions by the courts of this country from the Supreme Court on down.

The 2-to-1 decision was the appeals court's response to a plea by journalists that the telephone company be required to notify them before acceding to government subpoenas for records of their long-distance calls.

The practice now is for companies in

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the Bell System to refrain from notifying subscribers that their records have been subpoenaed if the government certifies that the subpoena is part of a felony investigation and that notification could impede the investigation. Such certification delays notification for 90 days, and it can be renewed repeatedly.

The journalists argued that the practice violated two parts of the Constitution: the Fourth Amendment protection against unreasonable search and seizure and the First Amendment guarantee of a free press. Therefore, they said, they should be notified of any subpoena of their phone records so they could seek a judicial determination if the needs of the government outweighed the other considerations.

The present practice, they said, jeo-

pardizes the confidential relationships with sources that are essential to today's journalism and opens the way to bad-faith anti-press activity by the government.

In a lengthy majority opinion written by Judge Malcolm R. Wilkey, the court rejected the journalists' argument. It said that the Supreme Court has made it clear that the needs of the government in conducting criminal investigations "always override a journalist's interest in protecting his source."

Wilkey said that journalists were trying to set themselves apart from other, "less exalted" citizens. And he made it clear that the court would have none of it.

If journalists and their sources want to maintain secrecy, he said, there are ways they can do it, although they may be inconvenient. But when they bring in third parties—in this instance the phone company—they can expect no help from the courts.

The finding—that while the press has certain constitutional protections, journalists have no special rights beyond those of other citizens—is too familiar to cause surprise. Wilkey's protest that the court was being asked "to decide that certain individuals' First Amendment rights are more important than those of others" and that "presumably, the more significant individuals and the more significant activities would have greater protections from good-faith investigations" goes to the heart of the court-press dispute. Wilkey is right in saying that there has been no showing of serious damage to the press through the present handling of phone records. It is interesting, though, that he wrote a 78-page opinion to sustain the decision, Judge Spottswood Robinson III took 19 pages to concur and Judge J. Skelly Wright devoted 38 pages to a dissent supporting the journalists. Clearly all three felt they were dealing with something more than a trivial issue.

The telephone case does, in fact, seem to go a significant step beyond two Supreme Court decisions that also involved confidentiality of sources. In those decisions, one involving the search of a newspaper office by police with a warrant and the other involving testimony by a journalist before a grand jury, the courts were involved. The search warrant was issued by a court, presumably after a determination that the needs of criminal justice overrode other considerations. And the journalist subpoenaed to testify had a chance to argue to the court that he should not be forced to testify.

The new element in the telephone-records case is that without notification there is no way for the journalist to know that his records have been subpoened and, therefore, no way for him to seek a judicial ruling before it is too late.

There are ways a resourceful journalist can keep secret information out of telephone records—slipping out of the office and using a pay phone to call a confidential source, for example—just as there are ways to reduce the danger that an unannounced police search will unearth confidential information.

But it is ironic that, in a country that purports to be deeply committed to a free press and opposed to efforts in other parts of the world to subvert the press, such defensive tactics are necessary.