Agnew Court Fight Raises Broad 1st Amendment Issues

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Vice President Agnew and his old foes of the news media are once again locked in combat, but the stakes have never been so high as in the coming battle over newsmen's confidential sources of information.

Instead of the verbal warfare that has raged since the first Nixon administration, the Agnew-press fight now involves Agnew's struggle to avoid indictment on one hand, and news media claims of First Amendment freedoms on the other.

The issues will be framed this week as several news organizations, including The Washington Post, move to quash subpoenas issued by Agnew's lawyers. The summonses demand that newsmen appear with voluminous records of their contacts with federal prosecutors who are presenting evidence of bribery, kickbacks and tax evasion to a federal grand jury in Baltimore.

Agnew's determination to block his indictment on grounds of prejudicial publicity is aimed nominally at alleged prosecution misconduct but his attorneys are demanding the testimony of newsmen in their attempt to prove that the prosecutor has "betrayed his responsibility" by leaking information to reporters.

The subpoenas, authorized but not yet enforced by federal Judge Walter E. Hoffman, raise issues that are even more far-reaching than the newsmen's privilege cases decided by the Supreme Court in June, 1972.

By a 5-to-4 vote at that time the justices held in three cases that newsmen may be compelled, on penalty of imprisonment for contempt, to tell grand juries about criminal conduct they have witnessed even if the testimony violates a confidential relationship between the reporters and their sources.

For Agnew to prevail, the courts must hold that the same principles apply to the demands for evidence by defense attorneys, not only in advance of trial but in advance of a grand jury indictment.

Defense counsel in the Watergate trial early this year demanded confidential information held by the Los Angeles Times but that court test—which was settled after one newsman spent a few hours in a federal lockup—came after indictment.

Thus, the Agnew subpoenas raise the First Amendment issues in their broadest form to date. In addition, they pose some fascinating procedural brain-twisters for a legal community already saturated with unanswered questions.

Lawyers for the press can be expected to argue that upholding the Agnew subpoenas would be an unwarranted extension of the Supreme Court's narrow ruling. They probably will contend that the ability of the press to function—and to gather critically important news in the face of the secrecy that bred Watergate—will be threatened still more if the subpoena principle is extended beyond the needs of a grand jury.

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They are certain to point out that the principle of the 1972 decision, which carries the title of Branzburg v. Hayes, has not yet been extended to civil cases such as Agnew's motion for an injunction to stop the prosecution

Not only has the Supreme Court not applied the Branzburg rule to civil cases, it has declined to disturb a decision of the Second U.S. Circuit Court of Appeals that specifically refused to force a newsman to divulge his sources in a civil libel suit

Interestingly, it would not strengthen Agnew's legal case to change the labels and call his supoenas part of a criminal case, since the federal law governing criminal cases does not allow for subpoenas at the pre-indictment stage.

Among the issues likely to emerge are these:

Does Maryland's state law granting newsmen a privilege against revealing confidential sources apply to a proceeding in Maryland's federal judge court? If so, how broadly should a federal judge interpret the law?

- Even if Agnew should prove misconduct by the prosecutors, would that alone justify a court order blocking any criminal case against Agnew and others? Such was the ruling of Judge W. Matt Byrne last spring at the close of the Daniel Ellsberg trial in Los Angeles, but there is no comparable ruling to cover a federal trial that hasn't started or a federal indictment that hasn't been returned.
- Does an accused have a right to a grand jury that has been insulated from extraneous information or possibly prejudicial publicity? Courts have sought to protect trial juries from exposure to inadmissible evidence, but grand juries are not so carefully restricted.
- Perhaps most fundamentally, will this be the occasion when, despite Supreme Court urgings to avoid a showdown, the rights of the press and the rights of the accused will clash head-on?

Judge Hoffman, in his charge to the grand jury last week, said, "We are rapidly approaching the day when the perpetual conflict between the news media, operating as they do under freedom of speech and freedom of the press, and the judicial system, charged with protecting the rights of persons under investigation for criminal acts, must be resolved."

The judge also instructed the jury to consider only the "credible" evidence offered by prosecutors in weighing any indictment. Judge Hoffman and higher courts may have to decide whether there is a basis for believing that the grand jurors no longer can follow that order.