# Excerpts From Subpoena Ruling

*U.S. District Court Judge Charles R. Richey yesterday denied a motion to require reporters and executives of The Washington Post and three other publications to testify and submit documents in three civil suits that grew out of the Watergate bugging conspiracy. The subpoenas were sought by the Committee for the Re-election of the President. Following is an excerpted text of Judge Richey's decision:*

We, then, must go to the constitutional issue which is viewed by this court, at least, as one of the first magnitude. What is involved here is the right of the press to gather and publish, and that of the public to receive, news from widespread, diverse and often times confidential sources.

Now, this record contains numerous and persuasive affidavits of prominent figures in the fourth estate or the field of journalism which assert unequivocably that the enforcement of these subpoenas would lead to the disclosure and subsequent depletion of confidential news sources without which investigative reporting would be severely, if not totally, hampered.

The competing consideration is the right of litigants to procure evidence in civil litigation.

Underlying that right is the basic proposition that the public has a right to every man's evidence, and that in examining any man's or any person's claim of exemption from the correlative duty to testify, there is . . the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional . . .7p This court is of the view, and so ands, that thesecases are all exceptional . . .

This court is of the view, and so finds that these cases are all exceptional on the basis of the facts alleged, and, thus, require a special, if not particular, scrutiny by the courts.

This court is well aware that other courts in civil and criminal cases, including the Supreme Court of the United States in a landmark case involving a newsman's testimony before a grand jury, have been reluctant in the absence of a statute to recognize even a qualified newsman's privilege from the disclosure of confidential news sources.

In view of the decisions and circumstances present in many of the cases, I think it will be instructive for all of us to note what is not — and I emphasize "not" — present in the instant cases.

First of all, these three cases . . . are not criminal cases. And even though they are primarily, with one exception, actions for monetary damages, their importance in the eyes of this court transcends anything yet encountered in the annals of American judicial history.

The movants are not parties, as has been suggested today, to these actions. But they have merely been called upon to testify and produce documents at an oral deposition. The parties on whose behalf the subpoenas were issued have not demonstrated that the testimony and material sought here go to the heart of their claim . . .

What is ultimately involved in these cases between the major political parties . . . is the very integrity of the judicial, as well as the executive, branches of our government and our political processes in this country.

For, without information concerning the workings of the government, the public's confidence in that integrity will inevitably suffer. This is especially true where, as here, strong allegations have been made of corruption within the highest circles of government and in a campaign for the presidency itself.

This court cannot blind itself to the possible chilling effect the enforcement of these subpoenas would have on the flow of information to the press and, thus, to the public.

This court stands convinced that if it allows the discouragement of investigative reporting into the highest levels of government, that no amount of legal theorizing could allay the public's suspicions engendered by its actions and by the matters alleged in this lawsuit . . .

Now, in proceeding to fashion a remedy in the instant case, the court would recall the words of Mr. Justice Powell's concurring opinion in the Branzburg v. Hays matter, wherein he stated, and I quote:

"The asserted claim of privilege should be judged on its facts by the striking of a proper balance between the freedom of the press and the obligation of all citizens to give relevant testimony.

"The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions."

Now, the court has noted the above constitutional interest, which, I might add, is an interest which translates itself in my mind into nothing less than the problem of maintaining an informed public, capable of conducting its own affairs. . .

Against this interest must be balanced the interest of the parties to receive evidence going to the substance of their claims.

Yet, there has been no showing that the alternative sources of evidence have been exhausted or even approached as to the possible gleaning of facts alternatively available from the movants herein.

Nor has there been any positive showing of the materiality of the documents and other materials sought by the supboenas.

In the face of these considerations, it appears to the court that what is asked for here, in effect, is for the doors to the reporters to be completely opened.

The scales, when balanced, however, are heavily weighted in favor of the movants.

The recognition that the movants are entitled, in my mind, to a qualified privilege from having to testify under the circumstances of these cases is not totally without legal precedent. . .

All indicate that First Amendment values will weigh differently in a civil case as against a criminal case.

And it should be noted that the Supreme Court, itself, in Branzburg declared that, without some protection for seeking out the news, freedom of the press would be eviscerated, and that is an exact quote.

This court disagrees with counsel for the newsmen in the sense that they can be said to have an absolute privilege. This court believes that the holding of an absolute privilege under the circumstances even of this case would be clearly improper under the Branzburg decision.

Now, it may be that at some future date the parties in this case will be able to demonstrate to the court that they are unable to obinterst in the information from sources other than the movants, and that they have a compelling and overriding intersts in the information thus sought.

Until that time, this court will not require movants to testify at the scheduled depositions or to make any of the requested materials available to the parties.

In conclusion, the court notes and believes that the First Amendment to the Constitution, to the Bill of Rights of the federal Constitution, is broader than that suggested by counsel for the news media. It entitles the public to more than the right to know. It also requires that any incursions into the areas protected by the Bill of Rights will be given a prompt judicial inquiry, and, hopefully, one that will be predicated on a judicial decision that will not only be sound—and this is what I want to emphasize —but which the public will understand and accept . . .

The government generally, and the courts in particular, must always stand first in the vanguard of upholding the spirit, as well as the letter, of the First Amemdment freedoms which, of course, are among the most precious of a citizens' fundamental rights.

This includes recognition of a special role for the press as was so well expressed by James Madison when he said, and I quote:

"A popular government without popular infomation, or the means of acquiring it, is but a prologue to a farce or tragedy, or perhaps both."

The court will enter an order that the subpoenas be quashed at this time.

Washington Post 22 March 1973

# GOP Subpoenas Aimed At 4 Publications Denied

3/22/73

By Lawrence R. Meyer
Washington Post Staff Writer

U.S. District Court Judge Charles R. Richey yesterday barred President Nixon's re-election committee from requiring reporters and officials of four publications, including The Washington Post, to testify and turn over documents concerning the Watergate bugging incident.

In an oral opinion delivered after three hours of argument, Judge Richey said: "This court cannot blind itself to the possible chilling effect the enforcement of these subpoenas would have on the flow of information to the press and, thus, to the public.

"This court stands convinced that if it allows the discouragement of investigative reporting into the highest levels of government, that no amount of legal theorizing could allay the public's suspicions engendered by its actions and by the matters alleged in this lawsuit."

The Committee for the Re-Election of the President in February issued subpoenas to

See SUBPOENA, A12, Col. 1

JUDGE CHARLES R. RICHEY
..."possible chilling effect"

## SUBPOENA, From A1

reporters and officials of The Washington Post, The Washington Evening Star-News, The New York Times and Time Magazine.

The re-election committee demanded, in addition to the testimony of 11 persons, that they produce all notes, tapes, story drafts, and other documents concerning the June 17 break-in and bugging of the Democratic National Committee's Wagergate headquarters as well as materials concerning other acts of political espionage.

Officials of the re-election committee are being sued by and in turn are suing officials of the Democratic Party in three lawsuits growing out of the Watergate incident. Lawyers for the re-election committee contended that they needed the testimony and materials from the journalists in connection with the litigation.

The four publications, in separate briefs, opposed the subpoenas on two basic grounds: that they were not permissible under the federal rules of civil procedure governing civil lawsuits in federal courts and that the subpoenas violated the First Amendment right of freedom of the press.

The First Amendment argument relied on the argument, supported by the sworn statement of more than 30 reporters, that the information sought would reveal confidential sources, endangering the ability of reporters to pursue investigative reporting and thus denying the public important information.

Richey rejected the rules of procedure contention of the subpoenaed journalists. Referring to the journalists as "movants" since they had brought the motion to quash the subpoenas, he said the subpoenas "are not so broad as to be unreasonable and oppressive and therefore are valid under the federal rules of civil procedure."

Turning to the constitutional argument, Richey acknowledged that the Supreme Court last summer had refused "to recognize even a qualified newsman's privilege from the disclosure of confidential news sources."

But in his oral opinion, Richey attempted to distinguish the present case from the Supreme Court's ruling that New York Times reporter Earl Caldwell and two other reporters were not shielded from testifying before grand juries by the First Amendment.

The three suits are not criminal cases, Richey said, although "their importance in the eyes of this court transcends anything yet encountered in the annals of American judicial history."

Second, Richey said, the journalists are not involved on either side of the suit. The re-election committee officials, Richey said, "have not demonstrated that the testimony and material sought here go to the heart of the claim.

"What is ultimately involved in these cases between the major political parties, as I said at the outset, is the very integrity of the judicial, as well as the executive, branches of our government and our political processes in this country," Richey said.

"For, without information concerning the workings of government, the public's confidence in that integrity will inevitably suffer. This is especially true where, as here, strong allegations have been made of corruption within the highest circles of government and in a campaign for the Presidency itself."

The re-election committee officials have a right "to receive evidence going to the substance of their claims," Richey said. "Yet there has been no showing that the alternative sources of evidence have been exhausted or even approached as to the possible gleaning of facts alternatively available from the movants herein.

"In the face of these considerations, it appears to the court that what is asked for here, in effect, is for the doors to the reporters to be completely opened," Richey said. "The scales, when balanced, however, are heavily weighed in favor of the movants."

Richey raised the cautionary note that "it may be that at some future date the parties in this case will be able to demonstrate to the court that they are unable to obtain the same information from sources other than the movants, and that they have a compelling and overriding interest in the information thus sought.

"Until that time, this court will not require movants to testify at the scheduled depositions or to make any of the requested materials available to the parties."

Rchey, who was appointed to the bench by President Nixon in 1971, rejected any notion that journalists have an absolute privilege under the First Amendment. Such a ruling, he said, "would be clearly improper" under the Supreme Court ruling last summer.

Kenneth Wells Parkinson, lawyer for the re-election committee officials, said no decision could be made on whether Richey's ruling will be appealed until he consults with his clients.

The 10 persons sought to testify were: Washington Post publisher Katharine Graham, managing editor Howard Simons, and reporters Bob Woodward and Carl Bernstein; New York Times reporter John Crewdson; Star-News reporters Patrick Collins, Jeremiah O'Leary, James Polk and former Star-News reporter Joseph Volz; and Time magazine correspondent Dean Fischer.

Joseph A. Califano Jr. represented The Washington Post. Floyd Abrams appeared for The New York Times, Francis L. Casey Jr. for the Star-News and John H. Pickering for Time magazine.

Ruling Text →