

Judge Puts a Limit on Disclosure Subpoenaed Writer Must Make

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SAN FRANCISCO, April 3—A Federal district judge ruled today that a New York Times reporter must appear before a grand jury, as directed, but would not have to disclose confidential information to the jury unless there is "a compelling and overriding national interest that cannot be served by alternative means."

Ruling from the bench at a conclusion of oral arguments,

Excerpts from the opinion appear on Page 19.

Judge Alfonso J. Zirpoli declared: "The relief sought presents issues of significant magnitude, issues that go to the very core of the First Amendment, the resolution of which may well be determinative of the scope of the journalist's privilege in sensitive areas of freedom of speech, press and association not heretofore fully explored and decided by the Supreme Court of the United States."

Anthony G. Amsterdam, a law professor at Stanford University and the attorney for the reporter, Earl Caldwell, said he believed that Mr. Caldwell's rights had been protected.

Justice Department lawyer said they would have to study Judge Zirpoli's opinion before deciding whether to appeal, but the judge said he assumed his ruling would be appealed by the Government.

Mr. Caldwell, a black reporter for The Times, is based here and frequently covers the Black Panthers.

Mr. Caldwell had been subpoenaed on Feb. 2 to testify before a Federal grand jury that is investigating the Black Panthers and to provide notes and tape recordings of his interviews with Panther leaders. A second subpoena was issued on March 16 requiring only Mr. Caldwell's personal appearance.

The hearing today was on a motion by Mr. Caldwell and The New York Times to quash both subpoenas. Alternatively, they asked for a court order restricting Mr. Caldwell's testimony to information that would not endanger his confidential relations with news

sources.

Mr. Amsterdam, the lawyer, said:

"What the court has done by this ruling is to protect any

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and all confidential disclosures that members of the Black Panthers may have made to Earl Caldwell.

"This is important because it allows Mr. Caldwell to give assurances to the Black Panthers or any other persons who are willing to speak confidentially to him that he will not disclose—and can't be required to disclose—what they tell him.

"It also means, of course, that other reporters can give the same assurances to their sources of information, if Judge Zirpoli's order is sustained on appeal."

Action on Order Staged

Judge Zirpoli invited counsel for Mr. Caldwell and The Times to submit a proposed wording for his final order. John B. Bates appealed for The Times. The judge also stayed execution of his order until the case could be appealed to the Court of Appeals for the North Circuit.

The Government voluntarily withdrew the first subpoena at the court's request to clarify the legal issues involved.

But the judge denied the request to quash the second subpoena on the ground that giving testimony before a grand jury is the obligation of "every person within the jurisdiction of the Government."

However, he added that Mr. Caldwell "is entitled to a protective order." He continued, "When the exercise of the grand jury power of testimonial compulsion so necessary to the effective functioning of the court may impinge upon or repress First Amendment rights of freedom of speech, press and association, which centuries of experience have found to be indispensable to the survival of a free society, such power shall not be exercised in a manner likely to do so until there has been a clear showing of a compelling and overriding national interest that cannot be served by alternative means."

Judge Zirpoli thus accepted the contention of Mr. Caldwell that his First Amendment rights would be seriously impaired if he were forced to testify about

confidential relationships.

Mr. Caldwell's professional standing would be "utterly destroyed" if his sources could not rely on him to protect their confidence, Mr. Amsterdam argued.

This assertion was endorsed by affidavits from several dozen newsmen, including other Times reporters and such well-known television personalities as Walter Cronkite and Mike Wallace.

Supporting Briefs Filed

media in the case was illustrated by the fact that amicus curie (friend of the court) briefs supporting Mr. Caldwell and The Times were filed by the Columbia Broadcasting System, The Associated Press, Newsweek, the Reporter's Committee on Freedom of the Press and the American Civil Liberties Union.

Victor C. Woerheide Jr., a special attorney in the Justice Department, argued that "under the law there is no privilege of confidentiality enjoyed by newspaper reporters."

"If the court rules otherwise it would have to make new law," Mr. Woerheide said.

Moreover, the attorney said, "there is no demand by the Government before the court whereby the witness would be asked to disclose confidential information."

Judge Zirpoli asked Mr. Woerheide if he would stipulate that Mr. Caldwell would not be asked to divulge confidences to the grand jury. The attorney declined, saying only that the subpoena did not specifically ask for confidential information.

Mr. Woerheide argued further

that it was impossible to set limits on Mr. Caldwell's testimony before he appeared. "The questions have to be posed, the witness has to decide whether to answer, and then we would have a justiciable matter," he said.

"There is a possibility," he added, "that Mr. Caldwell could be questioned extensively on matters which he would not raise a claim of privilege."

In arguing that Mr. Caldwell should be forced to testify, Mr. Woerheide said, "It is obvious that the Government is having trouble developing evidence" in its case against the Black Panthers. He said the Government had already granted immunity to three prospective witnesses and applied for immunity for two others.

Federal agents have been investigating the Panthers here and elsewhere for a number of

months. David Hilliard, the Panthers' chief of staff, was indicted here last December for allegedly threatening the life of President Nixon.

In their investigations, the Justice Department has subpoenaed materials from a number of newsmen, but none of the cases has reached the stage of Mr. Caldwell's case. The department has also asked the news media for files on the Weatherman faction of Students for a Democratic Society.

These subpoenas have been widely denounced by some news executives and public figures. Speaking at the university of California here yesterday Mayor Lindsay of New York said the subpoenas of newsmen were part of a pattern of behavior by the Nixon Administration that "constituted the greatest threat to freedom from our own Government in a generation."