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COURT RESTRICTS NEWS SUBPOENAS

Declares Government Must Show 'Compelling Need'

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SAN FRANCISCO, Nov. 17— In a landmark decision today, the United States Court of Appeals for the Ninth Circuit required the Federal Government to show a pressing need for evidence before ordering a journalist to testify in a secret grand jury proceeding.

The decision supported the refusal of Earl Caldwell, a reporter for The New York Times, to testify in an investigation of the Black Panther party. Mr. Caldwell is black.

Mr. Caldwell's lawyer, Anthony Amsterdam, said that he knew of no previous instance in which a Federal court had supported a reporter's refusal to testify and that certainly no Federal appeals court had ruled in that way.

The court held that "where it has been shown that the public's First Amendment right to be informed would be jeopardized by requiring a journalist to submit to secret grand jury interrogation, the Government must respond by demonstrating a compelling need for the witness's presence before judical process properly can issue to require attendance."

The appeals court noted that

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the "rule in this case is a narrow one."

"It is not every news source that is as sensitive as the Black Panther party has been shown to be respecting the performance of the 'Establishment' press or the extent to which that performance is open to view. It is not every reporter who so uniquely enjoys the trust and confidence of his sensitive news source," the court said.

The opinion conceded that "for the present we lack the omniscience to spell out the burden or of the type of proceeding that would accommodate efforts to meet that burden."

The court ordered the lower court to recommend rules to accomplish the end sought in the opinion. Federal District Judge Alfonso J. Zirpoli on April 3 directed Mr. Caldwell to testify under terms of an order that was designed to protect the reporter's rights and sources.

Mr. Amsterdam's incidental expenses in representing Mr. Caldwell were paid by the N.A.A.C.P. Legal Defense and Educational Fund, Inc.

Instead, with the support of The New York Times, which filed briefs in his behalf, Mr. Caldwell elected to appeal the order and argue that he should not be required to appear before the grand jury. A wide range of other publications, as well as individual newsmen, filed affidavits and briefs supporting Mr. Caldwell.

The case began Feb. 2, when a subpoena was served requiring Mr. Caldwell to appear before a grand jury Feb. 4. He was directed to produce tape recordings and notes of interviews with Black Panther leaders.

He resisted in the courts. The appearance was delayed twice and then postponed indefinitely while Judge Zirpoli considered the plea that First Amendment rights would be damaged if Mr. Caldwell were required to testify.

When Judge Zirpoli issued his order, Mr. Caldwell again refused to appear and was held in contempt June 5. The court of appeals reversed Judge Zirpoli and vacated the contempt judgment and the order requiring Mr. Caldwell to appear before the grand jury. The contempt order had been stayed to allow the appeal, which was decided today.

Today's opinion was written by Circuit Judge Charles M. Merrill, with concurrence of Circuit Judge Walter Ely and District Judge William J. Jameson of Montana, who sat in the case on special designation.

The opinion supported much that had been asked in the appeal. The court held that "if the grand jury may require appellant [Mr. Caldwell] to make available to it information obtained by him in his capacity as news gatherer, then the grand jury and the Department of Justice have the power to appropriate appellant's investigative efforts to their own behalf."

The court said this would convert a reporter "into an investigative agent of the Government."

"The very concept of a free press requires that the news media be accorded a measure of autonomy; that they should be free to pursue their own investigation to their own ends without fear of governmental interference, and that they should be able to protect their investigative processes," the opinion said.

Making reporters into investigators invades this autonomy, the court held, and "to accomplish this where it has not been shown to be essential to the grand jury inquiry simply cannot be justified in the public interest."

Judge Merrill's opinion said that the large number of affidavits in the case file "cast considerable light on the process of gathering news about militant organizations." The judge said this showed the "tenuous and unstable" nature of relations of militants with reporters.

This relationship could not survive "when the reporter is called to testify behind closed doors," he wrote, because militants "might very understandably fear that the reporter's resolve to protect them would crumble in the pressures of the secret hearing."

With a significant exception, the order appeared to be similar to guidelines issued Aug. 11 by Attorney General John N. Mitchell for issuance of subpoenas to reporters and photogaphers.

Mr. Mitchell ordered that none be issued unless the evidence was otherwise unobtainable and necessary for the Government's purposes. This is the essence of the ruling today. However, the appeals court would have a court decide whether or not the conditions were met, while Mr. Mitchell reserved final decision to himself.

At a news conference, Mr. Amsterdam, who argued the case for Mr. Caldwell, said that the appeals court "has shown its ability to resist the strongest blandishments" in making its decision.

Mr. Caldwell said that "no journalist could play both sides of the street" by reporting to a grand jury what his news sources had told him in confidence.