

Earl Caldwell Case

Sweeping Free Speech Win in Court of Appeals

The United States Court of Appeals for the Ninth Circuit has held that Earl Caldwell, a New York Times reporter, need not appear before a federal grand jury to answer questions about the Black Panther Party unless the government can demonstrate "a compelling need for [Caldwell's] presence . . ." The Government will seek a review of the decision in the U.S. Supreme Court.

Black Journalist

Caldwell is a black journalist who was sent to San Francisco by the New York Times with the specific purpose of seeking information on the Black Panther Party which was unavailable to white reporters. The assignment entailed a long process in which Mr. Caldwell won the trust of Panther officials and developed a relationship of confidence with them. This relationship of confidence and trust did not depend upon the customary "off the record" communications but rather on the understanding which Mr. Caldwell and the Panthers had between them. Because of this relationship with the Panthers, Mr. Caldwell was able to write a number of trenchant articles about the Black Panther Party, its activities and philosophies.

Subpoena Issued

The confidentiality issue arose when the Federal grand jury in San Francisco, on application of the United States Department of Justice, issued a subpoena requiring Mr. Caldwell to appear and testify before the grand jury about Panther activities. Caldwell resisted the subpoena and asked that it be quashed.

Landmark Decision

Federal District Judge Alfonso J. Zirpoli, in a landmark decision, refused to quash the subpoena but did issue a protective order which provided that in appearing before the Federal grand jury Caldwell need not answer questions that would require him to divulge confidential information unless the government could demonstrate that it had a "compelling and overriding national interest" in gathering the information and that it could not gather the information elsewhere.

Held in Contempt

Caldwell was not entirely satisfied with Judge Zirpoli's order because he feared that the simple fact of his presence before a secret grand jury meeting might destroy his relationship with Panther officials. Therefore, Caldwell refused to appear before the grand jury at all and was held in contempt of court. It is that contempt conviction which Caldwell appealed.

Contempt Conviction Reversed

The Court of Appeals has now agreed with Caldwell's contention and reversed his contempt conviction. Judge Zirpoli, the Court held, was correct in his precedent-setting ruling but did not go far enough. The Court said:

"If the Grand Jury may require appellant to make available to it information obtained by him in his capacity as a news gatherer, then the Grand Jury and the Department of Justice have the power to appropriate appellant's investigative efforts to their own behalf—to convert him after the fact 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 investigations to their own ends without fear of governmental interference, and that they should be able to protect their investigative processes. To

convert news gatherers into Department of Justice investigators is to invade the autonomy of the press by imposing a governmental function upon them. To do so where the result is to diminish their future capacity as news gatherers is destructive of their public function. 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.

"Further it is not unreasonable to expect journalists everywhere to temper their reporting so as to reduce the probability that they will be required to submit to interrogation. The First Amendment guards against governmental action that induces such self-censorship."

Tenuous Relationship

The confidential relationship between a reporter and his news source, the Court noted, is a "tenuous and unstable one":

"The relationship depends upon a trust and confidence that is constantly subject to re-examination and that depends in turn on actual knowledge of how news and information imparted have been handled and on continuing reassurance that the handling has been discreet. "This reassurance disappears when the reporter is called to testify behind closed doors. The secrecy that surrounds Grand Jury testimony necessarily introduces uncertainty in the minds of those who fear a betrayal of their confidences. These uncertainties are compounded by the subtle nature of the journalist-informer relation. The demarcation between what is confidential and what is for publication is not sharply drawn and often depends upon the particular context or timing of the use of the information. Militant groups might very understandably fear that, under the pressure of examination before a Grand Jury, the witness may fail to protect their confidences with quite the same sure judgment he invokes in the normal course of his professional work."

Amicus Appearance By ACLU

Caldwell is represented by Anthony G. Amsterdam, a Stanford Law School professor and ACLUNC Board member. ACLUNC and National ACLU, as they did in the District Court, supported Caldwell in the Court of Appeals in an amicus curiae capacity.