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Resignation Ends a Court Test On Disclosure of News Sources

By MARTIN ARNOLD

The resignation of Vice President Spiro T. Agnew ended what was hsaping up as a classic court test of the First Amendment guarantee of freedom of the press — a new battle over the reporter's right to protect the anonymity of news sources.

Before Mr. Agnew's resignation Wednesday; his lawyers had been granted by a Federal district judge in Baltimore the unprecedented right to serve subpoenas for "all writings and other forms of record (including drafts) "that touched on communication between newsmen and Government employes in connection with the criminal investigation of Mr. Agnew.

On Friday, seven subpoenas were served on news reporters and news organizations. In response, at least two of those organizations—The New York Times and the Washington Post —adopted a strategy in which the publishers would personally go to jail rather than turn over the materials of their staff members.

Prepared to Go to Jail

When Mr. Agnew resigned and pleaded no contest to income tax evasion, this in pending court confrontation became moot—of no legal importance. But Arthur Ochs Sulzberger, publisher of The Times, and Katherine Graham, publisher of The Post, had been prepared to go to jail. So had been A. M. Rosenthal, managing editor of The Times; Benjamin C. Bradlee, executive editor of The Post; and Osborn Elliott, editor of Newsweek, which is owned by the Washington Post Company.

The subpeonas had been served on Nicholas Gage of The Times, a reporter; William Sherman of the (New York) Daily News; Richard Cohen of The Washington Post; Newsweek magazine and its Justice Department reporter, Stephan Lesher; Robert Walters and Ronald Sarro of The Washington Star-News; Time magazine; and Fred P. Graham of C.B.S. News.

Leaks Are Alleged

In originally asking for such subpoena power, Mr. Agnew, contending that he was innocent, charged that leaks of information about his case had been made by the Justice Department and that they constituted a "malicious, immoral and illegal" attack on him.

The publishers and the reporters involved had decided that they would stand on the journalistic principal of refusing to disclose their sources, and Mr. Sulzberger and Mrs. Graham were prepared to go to jail with the reporters involved rather than disclose the sources and give up the reporters' notes and records.

The First Amendment provides that Congress "shall make no law. . . . abridging the freedom . . . of the press." The last major test to reach the Supreme Court involving a reporter's right to protect his sources and materials from disclosure involved Earl Caldwell, a Times reporter.

In that case, however, the classic question of whether a reporter should disclose his sources was not answered. The Supreme Court ruled in 1970 on the narrower issue of whether Mr. Caldwell should appear before a grand jury for questioning, and whether, once he appeared, he should answer questions concerning the commission of a crime he might or might not have witnessed.

The Court ruled that Mr. Caldwell must appear and answer questions, but so far the Government has not convened another grand jury to force him to appear.

The case involving Mr. Agnew and the reporters was different, and part of the news organizations' strategy was to force the issue once again to the Supreme Court, in the hope of at least further narrowing the Caldwell ruling.

One difference was that the Agnew case was a pure case of newsmen's sources. There was no contention that the journalists involved might have witnessed the commission of a crime.

Another difference was that the subpoena power granted Mr. Agnew's lawyers developed from what was in essence a civil suit against the news organizations, not from a criminal proceeding. The journalists were prepared to argue again that it was not within the rules to transfer criminal procedures into civil cases.

Further Rulings Made

Indeed, since the Caldwell case, Judge Irving R. Kaufman of the United States Court of Appeals for the Second Circuit, has ruled in one case that the criminal rules could not be applied to civil cases, and a Federal District Court in the District of Columbia has made a similar ruling.

The strategy of Mr. Sulzberger and Mrs. Graham was that, as chief executives of their corporations, they would say that the corporations, not the individual reporters, owned the information, and that they were, therefore, ordering the reporters not to turn it over to Mr. Agnew's lawyers or to the courts. They would, in essence, intervene between the court and their employes.

Among other things, it was hoped that the sheer drama of the publishers of two of the most influential newsgathering organizations possibly going to jail would have some subtle effect on the Supreme Court's deliberations, and at the same time perhaps force Congress and the public to consider more seriously any attacks on the First Amendment.