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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1381

PAUL M. BRANZBURG,

Petitioner,

v.

JOHN P. HAYES, Judge, Jefferson Circuit Court, Criminal Branch, Second Division,

and

PAUL M. BRANZBURG,

Petitioner,

v.

HENRY MEIGS, Franklin Circuit Court.

On Writ of Certiorari to the Court of Appeals of Kentucky

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The American Newspaper Guild, A.F.L.-C.I.O., C.L.C., respectfully moves for leave to file a brief *amicus curiae*

in this case in support of Petitioner, under Rule 42 of this Court. Attorney for the Petitioner has consented The consent of the attorney for respondents, the Commonwealth Attorney of Kentucky, has been requested, but has not been given.

This case presents the broad question whether in the interest of the functioning and maintenance of a free press, a news reporter is protected by the First Amendment against forced disclosure of confidential information received by him in the course of news gathering, and the narrower question whether he is protected against appearance before the Grand Jury to give testimony disclosing such information.

The American Newspaper Guild is a trade union, affiliated with A.F.L.-C.I.O., and with the Canadian Labor Congress. The Guild, through its affiliated Locals, is collective bargaining representative for about 30,000 employees of newspapers and other information media, such as magazines, television and radio broadcaster. Of these perhaps 15,000 are reporters, photographers, editors, editorial writers, and news analysts and commentators. Most are employed by newspapers, but a significant number are employed by magazines and broadcasters.

It is the purpose of the Guild, as set forth in Article I of its constitution, not only to advance the economic interests of its members, but also to protect and improve the standards and practices of journalism.

The questions presented by these cases is of the utmost importance to the membership of the American Newspaper Guild, and they have frequently, through representative conventions of the Guild, expressed their views thereon.

The Guild believes it will be of interest and assistance to the Court to know these views, and the practical and constitutional basis for them. The brief tendered herewith will not burden the Court with unnecessary repetition of facts, but will deal with the basic questions involved generally, as seen by the working newsman.

Respeectfully submitted,

IRVING LEUCHTER,
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BRIEF FOR THE AMERICAN NEWSPAPER GUILD, A.F.L.-C.I.O., C.L.C. AS *AMICUS CURIAE*

Introduction and Statement of Interest

The membership of the American Newspaper Guild has since its inception been deeply concerned with problems of forced disclosure by newsmen of news data acquired by them in their practice of journalism. This concern has not been merely vocational, but has been with the constitutional role of a free press in a democratic society as well.

The Guild fully supports the position of the Petitioner Branzburg herein. This position reflects the views of the working newsman, as expressed in Guild convention, from the inception of the Guild.

The Guild's 1934 First Annual Convention adopted a Code of Ethics. This Code called on the working newsman "to give the public accurate and unbiased news reports," to work against "the suppression of legitimate news concerning 'privileged' persons or groups" and it declared: "That newspapermen shall refuse to reveal confidences or disclose sources of confidential information in court or before other judicial or investigating bodies; . . ."

The Guild's 1959 Twenty-Sixth Annual Convention, reacting to *Garland* v. *Torres,* 259 F. 2d 545 (2d Cir.), cert. den. 358 U. S. 910 (1958) reaffirmed the principles stated in 1934, and resolved:

> "Whereas, a basic principle held by news reporters and editors is that confidences shall be kept and confidential sources of information shall be protected, and
>
> Whereas this principle is fundamental and necessary to the craft of journalism and is based upon the recognition that a newsman who disclosed con-

> fidential sources would soon be unable to collect the information necessary to give meaning to a free press. . . ."

Reacting to the first signs of a trend to forced disclosure by subpoena to a newsman to testify the Guild's 1969 Thirty-Fifth Annual Convention by resolution called on Publishers to ". . . resist any attempt by the courts or law enforcement agencies to use newsgatherers as arms of the court in such a manner as to impair their usefulness of newsgatherers." The Guild's 1970 Thirty-Sixth Annual Convention, faced with enormous proliferation of instances[1] in which government, and sometimes defendant's in criminal prosecutions, attempted to force disclosure by newsmen, incorporated into the Guild's Collective Bargaining Program, provisions for Publishers to join with and support the newsman in refusing to make disclosure, to join with and support him in defending against any prosecution resulting from such refusal, and to guarantee him against loss of employment and income as a result of his refusal to disclose.

ARGUMENT

The facts in this case will, of course, be stated in the briefs of the parties. Nor will this brief engage in unnecessary repetition in developing elaborate argument, and in exploring the nice problems raised by the many possible variations and permutations in the

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[1] The 1969 Convention had before it reports of four such instances. But the "Guild Reporter" (the newspaper of the American Newspaper Guild) reports 26 such separate instances in 1970, and 11 in the first half of 1961. These reports certainly cover only some proportion of all cases.

scope and application of the claimed newsman's privilege. This brief, rather, will concisely restate the propositions and principles which the American Newspaper Guild believes entitles the broad newsman's privilege against disclosure, historically espoused by the Guild, to the protection of the First Amendment.

I.

Preservation of the confidentiality of news sources and of unpublished background news information is an essential condition to the effective functioning of a free press in reporting news to the public. Destruction of these conditions by compulsory disclosure therefore abridges freedom of the press, contrary to the First Amendment.

That a free press which informs the people of the course of public affairs is essential to the vitality of American political democracy, and that a purpose of the First Amendment is to protect the press "untrammelled" in that role, is beyond dispute. *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250 (1936).

But the press cannot inform the people unless its newsmen can maintain communication with news sources, and this is especially true precisely of news of the greatest public significance. Nor is it a matter only of protecting the identity of news sources. These sources supply much background information, but not for publication, without which the newsman could not perceive the relation and flow of events, and could do little but echo official handouts, and without which news commentary and analyses would be impossible. Disclosure of such confidences will as quickly destroy communication between newsman and

news sources as the direct disclosure of the identity of news sources.

The working newsman has always known that forced disclosure will cut communication with news sources and so severely limit the scope of news and commentary which the press can report to the public. Hence, the resolutions and position of the American Newspaper Guild, from 1934 to date. The fact of the destructive consequences of forced disclosure on the flow of news from source to publication is now fully documented by the affidavits of prominent newsmen, submitted in the *Caldwell* case below. MARGARET SHERWOOD: *"The Newsman's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation"*, 58 Cal. Law Rev. 1198 (Oct., 1970), notes 26 to 37 at 1204-1206, and notes 185 to 192 at 1232-1234. The opinion of the Court of Appeals in the *Caldwell* case, referring to these affidavits, says: "The fact that the subpoenas would have a 'chilling effect' on First Amendment freedoms was impressively asserted in affidavits of newsmen of recognized stature, to a considerable extent based upon recited experience." 434 F. 2d 1081, 1084, and the Court of Appeals agrees with the conclusion of the District Court that forced disclosure "jeopardizes" confidential relationships "and thereby impairs the journalist's ability to gather, analyze, and publish the news", *In the Matter of Caldwell,* 434 F. 2d 1081, at 1085 (9th Cir., 1970).

A free press cannot serve the basic purpose of the First Amendment to enlighten the people, unless it is an informed press. "For without an informed and free press there cannot be an enlightened people." Mr. Justice Stewart, in *New York Times* v. *United States* and *United States* v. *Washington Post,* —— U. S. ——, Nos. 1873 and 1885, June 30, 1971. What its newsmen do not know, the press cannot publish.

Thus, a government which uses its legal powers to force disclosures of news sources and confidences from newsmen, in fact seriously curtails the ability of the press to gather, and necessarily, to publish news, and thus abridges the press freedom which the First Amendment guarantees.

I I.

The First Amendment bars government from compelling the press to function as an investigative agency of government.

Forced disclosure by newsmen by subpoena to testify is now common occurrence. Note 1, *supra.* Disclosure is by no means confined to identification of confidential sources and unpublished information. Newsmen are called on to verify published accounts of public men, and news photographers especially, to identify persons participating in open and public activity. Government thus has come to rely extensively on the ability of the press, through its newsmen, to learn and record facts publicly observable and equally available to government police and other investigative agencies. What advantage the newsman has is precisely that he is recognized as a newsman and not a police agent. He will not be able to acquire facts freely, to probe, question, investigate, if he is recognized as a potential government informer. Common knowledge that any newsman may be transformed into police agent by subpoena is undoubtedly one of the many reasons for the increasing frequency of violence by police as well as participants in public demonstrations and other events against newsmen, to prevent them from observing and recording the facts. Sherwood, "The Newsman's Privilege", *supra,* at 1207, notes 39, 40. See,

Schnell v. *City of Chicago,* 407 F. 2d 1084 (7th Cir., 1969). Not only does the prolific use of the subpoena impress a governmental function on the press; the practice, in addition to destruction of communication with confidential news sources, significantly impairs the ability of the newsman to report public events of great significance. Thus, the Court of Appeals in the *Caldwell* case:

> "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." 434 F. 2d at 1086.

III.

A newsman should not be required to appear for secret interrogation about facts he has acquired in the course of news gathering activity, regardless of any element of confidentiality.

For the reasons stated in Point II, this *amicus curiae* urges the view that a newsman is protected against the verification of published news stories and photographs, or to testify about facts acquired by him as a newsman, published or not, whether or not received in confidence, and whether or not descriptive of events publicly observable.

If that be a valid position, then, when the purpose of requiring a newsman to appear for secret interrogation, is to question him about facts acquired by him as a newsman, the constitutional privilege is as broad as the potential inquiry, and the appearance is futile.

But, since the newsman is questioned in secret, all that can publicly be known is that questions have been directed to his newsman's knowledge. What he answers no one not privy to the inquiry can know. So far as anyone can know to the contrary, he may have made disclosure. The possibility that he has made disclosure has the same potential effect as knowledge that he has. That he is subject to pressure to disclose, and for all anyone can know to the contrary, he may have, is enough.

Therefore, the newsman's First Amendment privilege fails its constitutional purpose if the newsman is required to appear before a secret investigative body for interrogation into his newsman's knowledge. To be effective, the privilege must protect him against appearance, and not merely against answering questions about privileged subject matter.

CONCLUSION

The order of the Kentucky Court of Appeals should be reversed.

Respectfully submitted,

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