THE NEWSMAN AND CONFIDENTIAL SOURCES: A FOCUS ON THE EARL CALDWELL CASE

by

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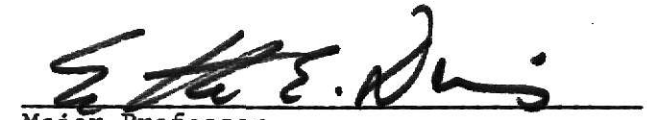

Major Professor

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INTRODUCTION

The newsman who is subpoenaed often is caught between his professional code of ethics which prohibits him from revealing confidential sources and information and his duty as a citizen to testify before a grand jury or court.

Compulsion of witnesses and the inquisitorial function of the grand jury were recognized by the founding fathers as aspects of judicial power. The right to witness was incorporated in the Constitution of the United States by the Sixth Amendment while the Fifth Amendment made it essential that an indictment by a grand jury was required to hold a person to answer for a crime.[1]

The United States Supreme Court has stated concerning duties of witnesses that "the giving of testimony and the attendance upon the court or grand jury in order to testify are public duties which every person within the jurisdiction of the government is bound to perform upon being properly summoned."[2]

The importance of the news media also was recognized when the founding fathers declared in the First Amendment that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[3]

Earl Caldwell, a 32-year-old black New York Times reporter, was confronted in 1970 with the conflicts of testifying and turned to the First Amendment for protection against government subpoenas. Caldwell is a specialist in reporting about the Black Panther Party, a militant

revolutionary organization. He refused to testify or appear before a federal grand jury investigating the Black Panthers.

A United States court of appeals ruled in Caldwell's favor, stating that a reporter cannot be ordered to appear before a secret federal grand jury unless the government demonstrates a "compelling need" for his testimony.[4] The United States Supreme Court, which has never decided a case directly on the question of press subpoenas, finally will speak to the issue with an appeal by the United States government of the recent ruling in Caldwell's favor.

A grand jury investigated the Black Panthers and the possibility that they were engaged in criminal activities contrary to federal law. Caldwell was subpoenaed to appear before the grand jury as the result of a newspaper article about the Black Panthers, written by the reporter, which appeared in The New York Times Dec. 14, 1969.[5]

Caldwell refused to appear. He related why from his own experiences:

> I began covering and writing articles about the Black Panthers almost from the time of their inception, and I myself found that in those first months that they were very brief and reluctant to discuss any substantive matter with me. However, as they realized I could be trusted and that my sole purpose was to collect my information and present it objectively in the newspaper and that I had no other motive, I found that not only were the party leaders available for in-depth interviews but also the rank and file members were cooperative in aiding me in the newspaper stories that I wanted to do. During the time that I have been covering the party, I have noticed other newspapermen representing legitimate organizations in the news media being turned away because they were not known and trusted by the party leadership.
>
> As a result of the relationship that I have developed, I have been able to write lengthy stories about the Panthers that have appeared in The New York Times and have been of such a nature that other reporters who have not known the Panthers have not been able to write. Many of these stories have appeared in up to 50 or 60 other newspapers around the country.

> The Black Panther Party's method of operation with regard to members of the press is significantly different from that of other organizations. For instance, press credentials are not recognized as being of any significance. In addition, interviews are not normally designated as being "backgrounders" or "off the record" or "for publication" or "on the record." Because no substantive interviews are given until a relationship of trust and confidence is developed between the Black Panther Party members and reporter, statements are rarely made to such reporters on an express "on" or "off" the record basis. Instead, an understanding is developed over a period of time between the Black Panther Party members and the reporter as to matters which the Black Panther Party wishes to disclose for publication and those matters which are given in confidence.

He concluded:

> If I am forced to appear in secret grand jury proceedings, my appearance alone would be interpreted by the Black Panthers and other dissident groups as a possible disclosure of confidences and trusts and would similarly destroy my effectiveness as a newspaperman.[6]

Caldwell pointed out, "What is significant is that in the past, many news organizations have readily complied with such requests as the government made on me. I refused and request became a demand. The media had put itself in the position of going along."[7]

Purpose of the Study

This is a study of New York Times Reporter Earl Caldwell and the court case involving his efforts to keep his reporter's records confidential as well as his refusal to testify before a federal grand jury. This study will attempt to bring together all the issues involved in the case as well as portray the atmosphere of the 1970's.

The objectives of this study are to (1) summarize the historical aspect of confidential sources and information; (2) discuss arguments concerning confidential communications and newsmen's privileges; (3) discuss the special problems of 1970 concerning the government's

issuance of subpoenas to news organizations and officials who were reporting about radicals; (4) document the Earl Caldwell court case from its origin to the Ninth U.S. Court of Appeals decision; (5) survey news personnel with national media and attorneys who were involved in events of 1970 pertinent to this study and determine if there are differences of opinion between the professions concerning confidential communications.

Newsmen particularly are interested in the Earl Caldwell case, which, to the writer's knowledge, has not yet been studied in any depth. This study is an effort to document the issues to give meaning to the court decision. Sigma Delta Chi, professional journalism organization, has requested a copy of this study.

CHAPTER I

HISTORICAL ASPECT

"Newspapermen shall refuse to reveal confidences or to disclose sources of confidential information in court or before other judicial or investigating bodies."--American Newspaper Guild, 1934.

Journalists, however, have no common law privilege to refuse to give the name of their sources. The courts have held time after time that, in the absence of a specific statute, newsmen have no legal authority to keep the sources of their information confidential.[1]

But a Michigan court held in 1878 that it was libelous to publish an accusation that a reporter had violated a confidence.[2] In two cases, reporters have revealed their sources when cited for contempt.[3]

The position of the courts, until Caldwell v. United States,[4] has been that the public's First Amendment right to be informed is not impaired if the journalist is restricted in his search for information by the possibility that the government may subpoena his confidential sources.

The restraints that may result on the freedom of the press by denial to protect sources of information have been considered secondary to the interest of the state in the determination of truth in a legitimate inquiry.[5]

In recent cases, for the first time news media sought to achieve judicial recognition for the journalist's testimonial privilege on the basis of the freedom of the press guarantee of the First Amendment.

The cases were Garland v. Torre,[6] radio and television columnist for The New York Herald Tribune; Murphy v. Colorado,[7] involving Mrs. Vi Murphy, reporter for The Colorado Springs Gazette Telegraph; In re Goodfader Appeal,[8] involving Alan Goodfader, reporter for the Honolulu Advertiser; and State of Oregon v. Buchanan,[9] a student editor of the University of Oregon's daily newspaper.

Until the Torre case in 1958, no appellate court or federal or state jurisdiction had ruled on this argument in relation to the journalist's claim of a testimonial privilege.

The first known case[10] involving a claim of journalist privilege arose in 1874 when an editor of The New York Tribune declined to reveal the names of the writers of an article in his newspaper, saying it was forbidden by office regulations and that, in principle, it should be the newspaper and not the individual writers who were responsible.

A variety of other arguments have been used in subsequent cases, but not until the Torre case was the attempt made to present the privilege issue as being based on the First Amendment's guarantee.

Among the most frequent arguments is a privilege based solely on professional custom. Courts generally have rejected these arguments unless there has been a statutory shield.

A successful use of a guarantee of the Constitution by a journalist in protecting his confidential news informant occurred in 1915.[11] The Supreme Court recognized the contention of City Editor George Burdick of The New York Tribune that he was privileged to decline to reveal his news sources for an expose of the U.S. Customs House on grounds of the Fifth Amendment guarantee against forced self-incrimination.[12]

One of the leading cases which rejected the claim of journalist privilege was People ex rel. Mooney v. Sheriff of New York County.[13] A reporter for The New York American was found guilty of contempt when he refused to answer grand jury questions regarding his sources of information in a series of articles on gambling. In pleading privilege, he cited established privileges concerning attorney-client and husband-wife relationships and asked the court to extend such a privilege to him. The New York Court of Appeals affirmed the judgment saying:

> The policy of the law is to require the disclosure of all information by witnesses in order that justice may prevail. The granting of a privilege from such disclosure constitutes an exception to that general rule. In the administration of justice, the existence of the privilege from disclosure as it now exists often . . . works a hardship. The tendency is not to extend the classes to whom the privilege from disclosure is granted, but to restrict that privilege.

In Garland v. Torre, Marie Torre had published an article in the New York Herald Tribune which was the basis of a defamation action brought against Columbia Broadcasting System by Judy Garland, a singer and actress. Miss Garland could not prosecute her claim against CBS without knowing which company official had made the defamatory statements to Miss Torre. The appellate court held that the Constitution conferred no right to refuse to answer and affirmed Miss Torre's contempt citation. The United States Supreme Court refused to hear the case. Miss Torre served a 10 day sentence for criminal contempt.

In Murphy v. Colorado, Vi Murphy refused to tell where she obtained a copy of a petition before it was filed with the court. The Colorado Supreme Court held that there was no journalist privilege by the First Amendment nor by the Constitution of Colorado. The U.S. Supreme Court

denied certiorari, and Mrs. Murphy served a 30 day jail sentence for criminal contempt.

In Goodfader's case, the reporter refused to reveal his source for a story in the firing of a Honolulu city official and was found to be in contempt. The Hawaii Supreme Court stated:

> 1. Freedom of the press under the First Amendment to the federal Constitution rests on the assumption that the widest possible dissemination of information is essential to the welfare of the public and that a free press is a condition of a free society.
> 2. Freedom of the press under the First Amendment to the federal Constitution is not an absolute.
> 3. Notwithstanding the broad scope and protective status of the freedoms and privileges of the First Amendment to the federal Constitution, none of them is absolute, and whether in any particular case an asserted right under the amendment should prevail or not depends upon weighing and balancing the protection afforded by the right asserted against the purposes that would be defeated or denied by recognition of the claimed freedom or privilege.
> 4. The freedom of press guarantee of the First Amendment to the federal Constitution is not in itself sufficient to protect a newspaper reporter from being required in a judicial proceeding to divulge his confidential source of news.

In the Buchanan case, the Oregon Supreme Court upheld a contempt conviction of Annette Buchanan who refused to disclose the names of students she had interviewed about the use of narcotics on the campus. The U.S. Supreme Court refused to review the case. Miss Buchanan paid a $300 fine.

The Oregon Supreme Court ruled that

> there is no constitutional reason for creating a qualified right for some, but not others, to withhold evidences as an aid to newsgathering. We do not hold that the Constitution forbids the legislative enactment of reasonable privileges to withhold evidence. That question is not before us. We hold merely that nothing in the state or federal Constitution compels the courts, in the absence of statute, to recognize such a privilege.

In re Taylor[14] was one of the first judicial decisions warning against the danger of government control. A Philadelphia grand jury,

investigating alleged criminal conduct and corruption in the legislative, municipal, and executive branches of the city government, subpoenaed both the general manager and city editor of the Philadelphia Bulletin. They were ordered to bring to the hearing all tape recordings, written statements, memoranda of interviews, notes, reports and copies of statements made by a third party whom the grand jury was investigating. The inanimate materials were held to protected by the Pennsylvania shield law for confidential sources. The court said:

> We are convinced that the public welfare will be benefited more extensively and to a far greater degree by protection of all sources of disclosure of crime, conspiracy and corruption than it would be by the occasional disclosure of the sources of newspaper information concerning a crime.

CHAPTER II

SHIELD LAWS

Journalists have no common law privilege to keep the sources of their information confidential and therefore must depend on legislative enactment for legality.

Maryland was the first state to enact a shield law, passing protective legislation in 1896. The law read:

> No person engaged in, connected with, or employed on a newspaper or journal shall be compelled to disclose in any legal proceeding or trial, or before any committee of the legislature or elsewhere, the source of any news or information procured or obtained by him for and published in the newspaper on and in which he is engaged, connected with or employed.[1]

This law resulted from a campaign by the Baltimore Sun after a reporter served a sentence for contempt of court. John T. Morris accurately predicted an indictment in a case a grand jury was considering. He was called before the jury to reveal the source of his information. Cited for contempt, the reporter spent four days in jail until the end of the jury's term.[2]

Seventeen states had shield laws by 1970. The statutory guarantees fall into three broad categories.

The first group includes Indiana, Montana, Nevada, Ohio and Pennsylvania which give the most complete protection. They protect reporters engaged in print and electronic media from divulging the source of information obtained "in the course of employment." Michigan has

modifications which limit the protection to "communication between reporters of newspapers or other publications and their informants."

The second category includes Alabama, Arizona, California, Kentucky, Maryland and New York which protect the source of published or broadcast information only. The source of information obtained but not used is not confidential under these statutes.

The third group includes Alaska, Arkansas, Louisiana, New Jersey and New Mexico which grant some form of reporter privilege but of rather limited and conditional nature. The laws are subject to numerous interpretations.[3]

Why is it that more states do not insure reporter privilege by statute? There are arguments for and against shield laws.

Walter Steigleman in The Newspaperman and the Law listed some of the points in trying to summarize the arguments. Those arguing for shield laws said:

1. Disclosure of sources cuts off further news.
2. Disclosure of crime or "unhealthy" civic or political associations aids justice.
3. Newspapermen can tap many sources which are reluctant to talk to police or authorities.
4. Printing of news is a public service.
5. Libel laws assure adequate protection against reckless publication.
6. The reporter's relation with his source is the same as that of a lawyer with his client.

Those opposed to such laws cite these points:

1. Courts fear their authority will be weakened if necessary evidence is excluded, and fair trials will be impossible.
2. A sensational press may extol criminals.
3. Public officials could be held up to ridicule and distrust by a newspaper which thus would be relieved of any responsibility to remedy the situation it exposed.
4. Newspapermen would be turned into detectives or might effect alliances with the underworld.

5. In all classes of privilege, the identity of both parties is known, but "shield" laws conceal one party. Therefore, it could not be determined if such a relationship actually existed.
6. News sources are not endangered without such a law because only a small percentage of news is obtained from sources reporters want to protect.[4]

"Uninhibited flow of news is considered by most to be by far the weightiest argument for reporter's privilege."[5]

The basic argument against recognition of a newsman's privilege is primarily that the judicial branch of the government should have full access to all pertinent information in the performance of its duties. Opponents contend that journalistic privilege would hinder the courts in an efficient search for truth and justice.[6] Opponents argue that a citizen's obligation to the administration of justice transcends the reporter's claim to the privilege of shielding his sources.[7]

John Henry Wigmore, American authority on evidence, sets out four fundamental conditions which should be met before the establishment of a privilege of any kind:

1. The communications must originate in a confidence that they will not be disclosed.
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
3. The relation must be one which in the opinion of the community ought to be seduously fostered.
4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.[8]

Wigmore did not think privilege for reporters met these four conditions and therefore was not valid.[9] But Dr. Fred Siebert, an authority on mass communication law, challenged this idea and attempted to make journalistic privilege comply with Wigmore's conditions:

In the first place, there is no question but that the relationship between an informant and a journalist is a confidential one. If the source does not trust the journalist, he will not reveal the information.

On the second test, there is again no question but that the journalist's relation with his source meets this test. If the journalist violates the trust placed in him by his informant, the relationship is destroyed and the informant no longer continues to supply information.

The third test can be proved by evidence at hand that the public is dependent on the journalist for its information, that this information should be full and complete, and that in many cases full and complete information cannot be obtained unless the source is protected.

The fourth test assumes that the principal function of society is litigation and consequently the need to have all relevant information available in a court of law. It neglects two important activities, the decision-making on the part of legislatures and on the part of the public in general elections. Granted that the function of litigation is an important one in our society, it is not the sole function. A court should have access to all relevant information in coming to a decision. But if the requirement that a journalist disclose the source of his information before a court would seriously interfere with his ability to acquire and disseminate information, then the right of a court to demand such disclosure should be carefully questioned. Which is more important? That the journalist be able to protect his information in order to acquire the information in the first place, or that the court know the name of the informant?[10]

One additional point needs clarification. What the journalist is concealing is not information in the sense that a lawyer, a doctor, or a clergyman is privileged to conceal information. It is obvious that each of these three groups of professional men have access to information which on occasion would be extremely valuable evidence in a court of law. What the journalist is concealing is not information, but the source of information, the name or names of his informers. All the information which the journalist has gathered is available in published form. His main purpose is to publish this information and make it available to everyone, including the members of the legislature, the courts, and the public. All the journalist is attempting to do is to keep open the channels of his information by protecting those sources which fear reprisal.[11]

Steigleman noted:

The question of privileged communications is old in law. A confidential status between lawyer and client was recognized back in the reign of Queen Elizabeth. Common law also recognized the same privilege between husband and wife. Now by statute or

> otherwise, practically every jurisdiction in the United States extends privilege to these classes as well as to priest and penitent, physician and patient, and informer and government.[12]

Zechariah Chafee, Jr., in Government and Mass Communications stated: "The consequences of threats of imprisonment for contempt are likely to be met by obstinate silence or by evasions and subterfuges."[13]

Because of differing state statutes and contradictory court decisions, the idea of a national newsman's privilege measure seems to be gaining support among newsman and legislators.[14]

CHAPTER III

SETTING OF 1970

Reports about protests against the war in Vietnam, the government and establishment politics were part of national media coverage in the latter part of the 1960's.

There were demonstrations, marches and teach-ins. Protests included burning of draft cards, bombing of ROTC buildings and confrontations with National Guardsmen and police. The Weathermen faction of Students for a Democratic Society and the militant Black Panther Party shouted their revolutionary rhetoric. It all made the front pages of newspapers and was viewed over television with the evening meal.

Then on Nov. 13, 1969, Vice President Spiro Agnew accused the television networks of permitting producers of news programs, newscasters and commentators to give the American people a highly selected and often biased presentation of the news. Agnew, in a speech before the Midwest Regional Republican Committee at Des Moines, Iowa, urged television viewers to register "their complaints" by writing to the networks and phoning to local stations. Thousands of Americans immediately responded to the vice president's invitation by calling the networks and many newspapers and stating their negative views on the media's handling of the news.[1]

Then the Justice Department attempted to use news media resources to obtain information about radical groups. Subpoenas were issued from

October of 1969 throughout 1970. There were statements and court cases for both the news media and the government.

And a majority of Americans appeared ready to restrict basic freedoms guaranteed by the Bill of Rights, according to a poll by CBS, the results of which were broadcast April 14, 1970.[2]

Even with no clear danger of violence, 76 percent of those polled said they opposed the freedom of any group to organize protests against the government. Smaller majorities indicated they would favor restrictions on other criticism of the government, freedom of the press, and double jeopardy and would support preventive detention.

The poll was a random national telephone sample of 1,136 adults. The results were broadcast on the program, "60 Minutes," together with excerpts from companion interviews conducted by CBS in Bloomingdale, Illinois.

Of 10 constitutional rights treated in the poll, CBS said majorities favored limiting five and offered only mild support of two others. Only three of the 10 protections won strong support. Trial by jury was endorsed by 82 percent of those questioned. Secret trials were opposed by 75 percent. Searches of homes without warrants were opposed by 68 percent.

Senate hearings on urban guerrilla warfare opened in October 1970. The Black Panthers and Students for a Democratic Society were primary targets.[3]

As many as 3,000 policemen rallied on the Capitol steps in October of 1970 to hear John H. Harrington, national chairman of the Fraternal Order of Police, say there was a national conspiracy by radical groups to

murder policemen. He blamed the deaths of 20 policemen by shooting in 1970 on the Supreme Court and the American Civil Liberties Union. He said the country was in a revolution and that militants, bent on killing policemen, were helped by lenient courts and the news media had some responsibility for a "lot of the things taking place." Harrington said the media were abusing freedom of the press by giving too much publicity to radicals.[4]

The Committee for Public Justice, an organization of prominent private citizens, was formed in November of 1970 because of concern that the nation had entered what was called a "period of political repression." Former U.S. Attorney General Ramsey Clark, a member, dismissed as "absurd" FBI Director Herbert Hoover's description of the Black Panthers as the most dangerous group in America. "The FBI outnumber the Black Panthers seven to one," Clark said.

Members of the Committee for Public Justice, led by the chairman, Roger W. Wilkins, an executive of the Ford Foundation, warned of an "alarming pattern" in American life.

> The President, the vice president and the attorney general have helped to create a political climate in which Congress has drastically prejudiced constitutional rights and in which police and other officials have been arbitrary in the execution of their responsibilities. At the same time, many judges have condoned or failed to alleviate these excesses.

Wilkins said that the committee would speak out from time to time on specific issues after these had been researched by law-school students.[5]

Issuance of Subpoenas

The first subpoenas were issued by federal courts in October of 1969 seeking unedited files and unused pictures about the Weatherman

faction of Students for a Democratic Society from Time, Life, Newsweek and four Chicago newspapers. The subpoenas, issued soon after a disturbance in Chicago by Weathermen, were disclosed for the first time by representatives of the three national magazines in separate interviews January 31, 1970. This followed issuance of subpoenas to other media.

Time and Life complied with subpoenas. Newsweek tried to work out an informal agreement to delete names of any confidential informants before delivering its files. The Chicago Publishers Association planned court action to quash subpoenas issued to Chicago newspapers.[6]

In January 1970, federal authorities subpoenaed CBS tapes and out-takes or unused portions of a program about Black Panthers. The broadcast was carried on January 6 in the network's "60 Minutes" series.

A spokesman for the Secret Service said the Department of Justice had subpoenaed both the televised and unused portions of the program for use in its case against Dave Hilliard, national chief of staff of the Black Panthers, who was interviewed on the show. Hilliard was arrested in San Francisco December 3, 1969, on charges of threatening the life of President Nixon during a Moratorium Day speech on November 15 in Golden Gate Park.[7]

CBS said January 26 it would comply with the government's subpoena for news film of the complete program, including portions not shown to the public. The network said it had no alternative to cooperation in a criminal case involving an individual accused of threatening the life of the President of the United States.

Meanwhile, CBS was served with a second subpoena January 26 by the Secret Service, working with the FBI, demanding a complete record of all

correspondence, memoranda, notes and telephone calls made in connection with arranging the Black Panther program, including an interview with Eldridge Cleaver, the party's minister of information who was living in Algeria. The subpoena covered the period from mid-1968 to 1970.

Paul Sternbach, CBS general counsel, said he would endeavor to narrow the scope of the subpoena to a specific issue before the grand jury meeting in San Francisco. He stated the company was totally opposed to subpoenas so broad in scope as to constitute an unwarranted handicap on legitimate investigative journalism by television. Sternbach said he doubted if the average reporter in any medium kept a record of all memoranda or telephone calls extending over more than 18 months.

Sternbach stated he also was disturbed that the second subpoena not only wanted complete records of the CBS network news department but also had asked for the same information from individual stations owned by CBS. The attorney noted it was not unusual for a company to negotiate with federal authorities for modification of a subpoena's terms so that both parties, if not completely content over the outcome, were reasonably satisfied.

A CBS spokesman said that it was television's aim to draw the clearest possible line between requirements of a free press and the legitimate needs of traditional inquiry. He noted that a threat on the President's life was a special circumstance.[8]

Dr. Frank Stanton, president of CBS, stated, "The question of the extent to which news gathering organizations and reporters can be required in certain criminal proceedings to provide material gathered in the course

of news functions but not published or broadcast is an immensely important one."[9]

NBC and ABC said they followed the same essential policy as CBS and that deleted portions of a program were never released except upon service of a subpoena for good cause.[10]

Then Earl Caldwell was subpoenaed February 2 to appear before a federal grand jury and bring his notes and tape recordings. Arthur Ochs Sulzberger, president and publisher of The New York Times, the next day said, "All citizens, including newspapermen, have a duty to respect proper judicial processes, but The Times intends to use all its resources to make sure that no judicial action violates the constitutional guarantees of a free press and the rights of newspapermen to carry on their work freely and without coercion."[11]

Hedley Donovan, editor in chief of Time, Inc., in a statement February 3, deplored the increase in the number of subpoenas being issued to the press and said that such action "appears to make the press an arm of law enforcement agencies, which is not its role. In some cases, indeed, we believe that law enforcement agencies have found it convenient to force the press to supply them with information that they should have obtained themselves," he said.[12]

Ernest Dunbar, senior editor of Look magazine and chairman of the New York Chapter of Black Perspective, an organization of black professional journalists, said of the subpoena to Caldwell:

> We feel this action not only violates the reporter's confidentiality but equally transforms him involuntarily into a government agent. Such an action is especially onerous in the case of a black reporter whose creditability, reputation and ability to function in the black community would be destroyed by such forced testimony.[13]

There were protests about the subpoenas from news organizations, wire services, newspapers, broadcast media and journalism schools.

Former Federal Communications Commission Chairman Newton Minow urged media to refuse to honor subpoenas. He said the media management should say, "You cannot have the film. You cannot have the reporter's notes and, if need be, we'll see you in the U.S. Supreme Court."[14]

Federal Communications Commissioner Nicholas Johnson said February 12 that the nation's news media had an "absolute right" to refuse the demands by government prosecutors for reporters' notes and unused television film. Johnson attacked the Nixon Administration and the Justice Department for encouraging the demands for unpublished news information. And he attacked media management for what he termed its "acquiescence." "I believe the wave of government subpoenas, together with other manipulations of the press, have placed the freedom and integrity of this country's news media in serious jeopardy," Johnson said in an address to a Washington gathering of former Harvard Neiman Fellows in journalism.

"What will happen to freedom of news-gathering and therefore the public's access to vital information if news sources know that the material they give in confidence can be subpoenaed by the government for use in public courts of law?" he asked. "The answer, I think, is clear: sources of news and information will dry up." The First Amendment's guarantee of free speech and press, he said, "protects not just the right of the press to speak but the right of the people to hear."

He said:

> The media have vast financial and legal resources at their command. The country could only benefit if they were to resist government enroachments upon their independence and defend, in court, their absolute First Amendment right to refuse such subpoenas.

> Any criminal lawyer worth his salt will immediately go into court and vigorously raise every conceivable defense to protect his client. I think we are entitled to at least as much from the owners of the press when our First Amendment rights are concerned. Despite a practice lasting several years, however, the monolithic news media have yet to file one motion of resistance in court.[15]

Dean Burch, head of the Federal Communications Commission, said March 1 that reporters' notes should be exempt from court subpoena but that unused portions of television film presented, in some cases, a very definite problem.

> I don't think a reporter should be required to disclose the sources of his information, and if you can say that an out-take, a piece of film that isn't used, is the same as a reporter's notes, I think that the same rule would apply. I don't think there is any question about a reporter's notes being sacred.

Television news film poses a different problem, Burch continued, in such cases when "a camera actually detects a criminal act being performed and that film is available and would prove a fact." Burch, however, urged that courts and Congressional committees bear in mind "that reporters go out and create their own product, and it should not be subject to official process in the normal instance."[16]

Subpoena Guidelines

Attorney General John N. Mitchell said February 5 that the Justice Department was taking steps[17] to assure that no subpoenas would be issued to members of the news media without an attempt first to reach agreement on the scope of the subpoenas.

A spokesman for the department said that investigating officials had breached a long standing policy of agreeing with newsmen on the information to be demanded before subpoenaing their files. "There was a breakdown in the established pattern of subpoena negotiation," the official

said, which resulted in the issuance without prior notice of subpoenas on news organizations that had investigated activities of radical political groups.[18]

The attorney general sent out invitations on February 7 to executives of news organizations across the country offering to explain personally the Justice Department's policy on obtaining information from news media. Some news executives did meet with Mitchell. Though the meetings were generally described as cordial, at least one news executive suggested they had not reduced significantly the differences about how much information the news media should be forced to surrender to the courts.[19]

Attorney General Mitchell issued guidelines[20] to the Justice Department August 10 in what he described as a move to limit the discretion of government lawyers to subpoena newsmen to testify in criminal cases. The guidelines stated that, in general, reporters and photographers will not be subpoenaed unless the information is crucial and cannot reasonably be obtained elsewhere.

Under the guidelines, no Justice Department attorney may seek to subpoena a newsman without Mitchell's permission. There must first be efforts to get the information elsewhere, and then negotiations must be attempted to get the reporter to give information voluntarily. If a subpoena is considered necessary, "normally" it will be limited to the verification of published information. But the government still reserved the option, under certain circumstances, to insist that a reporter disclose unpublished information and to testify even when a reporter contends it was given to him in confidence.

Appearing before the House of Delegates of the American Bar Association, the attorney general also asked the association to resolve the conflict between newsmen's contentions that their sources of information would dry up if they testified against their informants and the government's need of evidence of crimes.

The attorney general said:

> The government views subpoenas to the press as an authorized and proper exercise of the federal grand jury power to obtain facts tending to prove or disprove allegations of criminal conduct.
>
> The press views subpoenas as an effort by the government to utilize the media as a quasi-governmental investigatory agency--whether the subpoenas call for production of publicly-disclosed information, such as photos of a demonstration, or for information received in confidence.
>
> Thus the press argues that its appearances before a grand jury inhibit its ability to freely collect and publish news, and impose both prepublication and postpublication limitations on First Amendment rights.[21]

Attorney General Mitchell also said he would not oppose legislation granting "some form of reporter-informant privilege. But we have no such legislation today, and I am required to use the tools which I have attempting to fairly administer justice."[22]

Organizations Study Subpoenas

The impact of subpoenas on newsmen and their sources was to be assessed in a joint study by the University of Michigan Law School and the Columbia University Graduate School of Journalism. The study, financed by a $26,775 grant from the Field Foundation of New York, was announced in October of 1970 by the Reporters Committee on Freedom of the Press, a group of newsmen organized in March 1970 in response to increased government demands for information from newsmen.

Vince Blasi, associate professor of law at Michigan, was named director of the study. He said it would cover First Amendment questions,

the effect and constitutionality of existing state statutes that grant a qualified privilege to newsmen and procedural and practical problems in litigation on the issue. Research assistants at Michigan and the Stanford University Law School were to interview reporters, editors, prosecutors and news sources to determine the impact of subpoenas on the flow of news and law enforcement.[23]

The Twentieth Century Fund established a panel to define the rights of journalists to protect confidential sources of information. The fund was to publish a report. The scope of the subpoena power of government agencies and rights of newsmen under the First Amendment were to be examined in the study.[24]

Other Newsmen in Court

Besides the Caldwell appeals court ruling, there were other favorable court decisions during 1970.

• Chicago Criminal Court Judge Louis Garippo, in a case involving the Chicago Tribune, held unconstitutional Illinois laws authorizing subpoenas for private files and photos of newspapers and other news media. The Chicago judge also set guidelines, similar to those issued later by the Attorney General, under which the news media might be subpoenaed.

• San Francisco Superior Court Judge Lawrence Mana held that it would violate both First and Fourteenth Amendments to require television stations to produce unbroadcast television film. The ruling was issued during the trial of six youths charged with the murder of a San Francisco policeman.

• New York Federal Judge Orrin G. Judd refused to require a New York Times reporter to produce his notes on a story dealing with air

traffic controllers in their dispute with the Federal Aviation Administration.[25]

Other newsmen received setbacks in court during 1970 and 1971.

• Mark Knops, editor of the Madison Kaleidoscope, was ordered to appear before a grand jury following an explosion at the University of Wisconsin which killed a graduate researcher. He was asked to discuss a Kaleidoscope story that claimed bombers had discussed the Wisconsin explosion and their future bombing plans.

Knops refused, citing the Fifth Amendment. After being given immunity, Knops still refused to testify. He was jailed for contempt and later released on bond. The Wisconsin Supreme Court ruled that the state had a clear need to obtain information from Knops. Warrants for four suspects in the case were issued, despite the refusal of Knops to testify.

Two other cases are pending before the U.S. Supreme Court along with the Caldwell case.

• The Kentucky Court of Appeals determined that the state newsman's privilege law does not require newsmen to reveal confidential sources but may allow confidential information to be disclosed. A grand jury asked Paul Branzburg, a reporter for the Louisville Courier-Journal, to identify the individuals he discussed in a story describing the manufacture of hashish. Branzburg refused, claiming protection under the Kentucky privilege statute. The appeals court said the individuals manufacturing the hashish were not the source of the story and their identity was not protected.[26]

• The Supreme Court of Massachusetts upheld a lower court's ruling that would require Paul Pappas, a Providence, R.I. television

reporter-cameraman, to appear before a grand jury to testify about Black Panther activities he witnessed in July in New Bedford, Mass. The Supreme Court said the ruling of the Superior Court judge was correct--newsmen have no constitutional right to withhold testimony.

Panthers had allowed Pappas to spend the night of July 30 in their headquarters in anticipation of a police raid that did not occur until after he left. Pappas said he had promised the Panthers he would not disclose what he saw or heard while in their quarters.[27]

The Massachusetts Supreme Court said that the First Amendment's free press clause does not protect the newspaper reporter from being subpoenaed before a grand jury and forced to disclose confidential sources about possible criminal activity in grand jury's investigation of crimes committed during a riot. This does not preclude the trial judge from exercising his discretionary authority to keep the grand jury from exceeding its authority and harassing reporters and their newspapers with unwarranted questions that will scare off valuable news sources, the court ruled.

> Were we to adopt the broad conclusions of Caldwell that a newsman's privilege exists because of the First Amendment, we would be engaging in judicial amendment of the Constitution or judicial legislation. Requiring a newsman to testify about facts of his knowledge does not prevent their publication or the circulation of information. Any effect on the free dissemination of news is indirect, theoretical, and uncertain, and relates at most to the future gathering of news.
>
> The opinion in the Caldwell case largely disregards important interests of the federal government and the several states in enforcement of the criminal law for the benefit of the general public . . .
>
> We adhere to the view that there exists no constitutional newsman's privilege, either qualified or absolute, to refuse to appear and testify before a court or grand jury.[28]

Legislation to Insure Newsmen's Privilege

Reporter protection bills were introduced during 1970 in both houses of Congress. Sen. Thomas McIntyre, Democrat from New Hampshire, and Rep. Richard Ottinger, Democrat--New York, introduced a bill, and Rep. Ogden Reid, Republican of New York, former president and editor of the New York Herald Tribune, also presented a bill for newsmen's protection. The bills died in the 91st Congress.

In the 92nd Congress, Rep. Charles W. Whalen, Republican of Ohio, introduced the "Newsmen's Privilege Act of 1971," HR 4271, to permit reporters to keep confidential unpublished information and the sources of that information. He said:

> If enacted the bill clearly would prevent the government, or anyone else for that matter, from embarking on "fishing expeditions" in reporters' notes and files.
>
> The "privilege" accorded by the bill would apply to reporters, editors, commentators, journalists, writers, correspondents, announcers or other persons "directly engaged in the gathering or presentation of news for any newspaper, periodical, press association, newspaper syndicate, wire service or radio or television station." It protects the newsman's sources and unpublished or unbroadcast material. And the newsman cannot be required by "any court, grand jury, agency, department or commission of the United States or by either House of, or any committee of, Congress" to divulge that information.[29]

Sen. James B. Pearson, Republican of Kansas, has introduced a "Newsmen's Privilege Act," S. 1311, paralleling the Whalen bill. Pearson, in introducing his legislation, noted that the first proposal for a newsman's privilege bill was introduced by another Kansan, Sen. Arthur Capper, in the 71st Congress more than 40 years ago. Both Whalen's and Pearson's measures provide four exceptions to the privilege.

1. Material that has been made public cannot be shielded.
2. In libel cases, a newsman must provide the name of his source if his defense is based on the statements of a confidential personage.

3. In secret proceedings, such as a grand jury hearing, a source who discusses secret proceedings cannot be protected.
4. U.S. district courts are allowed to require disclosure if information is needed "to prevent a threat to human life," to stop espionage or to halt foreign aggression.[30]

Attorney General John Mitchell said May 12, 1970, on the "60 Minutes" program of CBS that he would accept a federal law "guaranteeing the confidentiality" of a reporter's notes or television film. He said that such a law "might in some instances impair the administration of justice" but that "the confidentiality of the activities of reporters would add to the dissemination of news and it would add to the type of news that is disseminated, and I think in the long run, in balance, that might be for the benefit of our community and society."[31]

In New York state, Governor Nelson Rockefeller signed "the freedom of information bill for newsmen" May 12, 1970, saying that it "clearly protects the public's right to know and the First Amendment rights of all legitimate newspapermen, reporters and television and radio broadcasters." The governor said the new law, which is an amendment to the state civil rights law, would protect "journalists and newscasters from charges of contempt in any proceeding brought under state law for refusing or failing to disclose information obtained in the course of gathering news for publication."[32]

CHAPTER IV

THE EARL CALDWELL CASE

Decision of Appeals Court

A reporter cannot be ordered to appear before a secret federal grand jury unless the government demonstrates a "compelling need" for his presence, a U.S. court of appeals ruled Nov. 16, 1970.

The three-judge panel of the Ninth U.S. Circuit Court of Appeals in San Francisco dismissed a lower court contempt citation against Earl Caldwell. Reversing a June 5 contempt citation, the three-judge panel said in an opinion written by Judge Charles M. Merrill:

> 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 judicial process properly can issue to require attendance.

The court said:

> The need for an untrammeled press takes on special urgency in times of widespread protest and dissent. In such times the First Amendment protections exist to maintain communication with dissenting groups and to provide the public with a wide range of information about the nature of protest and heterodoxy.

The court observed that "militant groups might very understandably fear that, under the pressure of examination before a grand jury, the witness may fail to protect their confidence with quite the same judgment he invokes in the normal course of his professional work."[1]

Judge Alfonse Zirpoli ruled April 3, 1970, in U.S. District Court that Caldwell must appear, although entitled to refuse to answer certain

grand jury questions until the government demonstrated "a compelling and overriding national interest" requiring his testimony.

Caldwell, refusing to appear and cited for contempt of court, appealed on grounds that going behind the door of a secret grand jury would create a barrier between the reporter and persons within the Panthers who believed they were speaking to him in confidence.[2] The appeals court, in upholding Caldwell, said:

> It is apparent that the relationship (of a reporter and his sources) is a very tenuous and unstable one. Unlike the relationship between an attorney and his client or a physician and his patient, the relationships between journalists and news sources like the Black Panthers are not rooted in any service the journalist can provide, apart from publication of the information.

The court said that the reporter's relationship with such sources as the Panthers

> 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 . . . 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 the grand jury testimony necessarily introduces uncertainty in the minds of those who fear a betrayal of their confidence. These uncertainties are compounded by the subtle nature of the journalist-informer relationship.

The opinion supported much that had been asked in the appeal. The court held that "if the grand jury may require appellant 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 files "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."

The court noted that its ruling 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 this sensitive news source.

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

This opinion was written by Circuit Judge Merrill with concurrence of Circuit Judge Walter Ely and District Judge William J. Jameson of

Montana, who sat in the case on special designation.[3]

Caldwell's attorney, Anthony Amsterdam, Stanford Law School, 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.

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.

A wide range of publications as well as individual newsmen filed affidavits and briefs supporting Caldwell. Amsterdam's incidental expenses in representing Caldwell were paid by the NAACP Legal Defense and Educational Fund, Inc.[4]

Year of Legalities

The first subpoena was served on Caldwell on Feb. 2, 1970. It ordered him to appear at the U.S. Courthouse at San Francisco on February 4 with

> notes and tape recordings of interviews covering the period from Jan. 1, 1969, to date, reflecting statements made for publication by officers and spokesmen for the Black Panther party concerning the aims and purposes of said organization and the activities of said organization, its officers, staff, personnel and members, including specifically but not limited to interviews given by David Hilliard and Raymond "Masai" Hewitt.[5]

His appearance was delayed to February 11, then to February 18 and then postponed indefinitely. Amsterdam, attorney for Caldwell, read a statement at a news conference in the U.S. Courthouse press room on February 10.

TABLE 1

CALENDAR

Feb. 2, 1970	First subpoena served on Earl Caldwell ordering his appearance with notes and tape recordings before a federal grand jury investigating the Black Panther Party.
March 16, 1970	Second subpoena served on Earl Caldwell for his appearance. It did not require the producing of any records.
April 3, 1970	Ruling of United States District Court for the Northern District of California.
April 8, 1970	Order signed limiting the federal government's power of subpoena on Earl Caldwell.
June 5, 1970	Earl Caldwell found guilty of civil contempt for refusing to testify before a grand jury.
Nov. 16, 1970	Ruling of United States Court of Appeals for the Ninth Circuit, San Francisco, California.
May 3, 1971	Certiorari granted by Supreme Court of the United States--United States of America v. Earl Caldwell.

> Even following Attorney General Mitchell's statement of February 5, the government has continued to seek Earl Caldwell's appearance before the grand jury. It is Caldwell's position that he declines to appear before the grand jury, and that his legal rights will be infringed if he is compelled to appear.[6]

Attorney General John Mitchell said on February 5 that the Justice Department was taking steps to assure that no subpoenas would be issued to members of the news media without an attempt first to reach agreement on the scope of the subpoenas.[7]

A second subpoena was served March 16 and did not require the producing of any records. It ordered Caldwell to appear March 25. A motion was filed March 17 at San Francisco by Caldwell's attorney and John B. Bates, attorney for The New York Times, asking the U.S. District Court to quash two subpoenas issued to Caldwell that would require him to appear before a federal grand jury.

The motion asked that the subpoenas be modified so that Caldwell would not be required to testify about any information except that which he wrote for The New York Times, and that the date of his grand jury appearance be continued until the motion was decided. On March 17, U.S. District Judge Zirpoli set April 3 for a hearing on the motion. Caldwell's appearance at the grand jury was postponed.

The motion was argued on the following grounds:

- The government must be required to show its need for information in order to justify the "grave, widespread, and irreparable injury to freedoms of the press, of speech and of association" that the subpoenas could cause if Caldwell's testimony is required.

- The subpoenas "intrude upon confidential associations necessary

for the effective exercise of First Amendment rights "by inhibiting Caldwell's access to news sources on a confidential basis.

• "The subpoenas are very probably based upon information obtained by the government through methods of electronic surveillance" that violated Caldwell's constitutional privileges.

Amsterdam told reporters after the motion was filed that Caldwell would not resist giving testimony that would validate the authenticity of statements made by Black Panther leaders as printed in The New York Times in stories he had written. But the correspondent will not give unpublished material on the grounds that it is confidential communication between him and his news sources, Amsterdam said.[8] Bates said he was present because, "The New York Times feels this is a very important area. I am here to support the position taken by Caldwell and to show that The New York Times has a deep interest in these matters."[9]

A series of affidavits was attached to the motion. Some of these said that Caldwell, as a black reporter, was assigned to San Francisco in 1969 in part to cover news of the black community. Other affidavits said that militant groups generally were distrustful of reporters and that should Caldwell be subpoenaed before secret grand jury proceedings, it would be assumed by these groups that he had testified at length, no matter what he actually had done.

The argument that the government had based its subpoenas on electronic surveillance of the Panthers was made through an affidavit filed by Amsterdam who reported about his conversations with Victor C. Woerheide, an assistant attorney general, who conducted investigation of the Black Panthers. Amsterdam said that on two occasions in early

February, Woerheide told him that Woerheide had read only one of Caldwell's articles about the Black Panthers and had based the earlier subpoena on that article which was published December 14, 1969.

Amsterdam said that Woerheide had said he knew that Caldwell had interviewed Hewitt but did not know whether any part of this interview had ever been published.[10] A copy of the December 14, 1969, article was attached to the Amsterdam affidavit. Hilliard was quoted several times in it, but Hewitt's name did not appear.[11]

The argument filed said:

> As we noted at the outset of this motion the government asserts unexplained knowledge of some unpublished interview of "Masai" Hewitt by Caldwell. The likely explanation--we put it this way because only the government knows the facts--is electronic surveillance by government agents of the Black Panthers.

The court was asked to inquire of the government if it had been listening to Panther telephone calls or the talk in rooms where Panthers gathered, and if this electronic surveillance was the basis for the subpoenas issued to Caldwell. "If this inquiry discloses an illicit basis for the subpoenas, of course they must be quashed," the attorneys argued.[12]

Government attorneys on March 27 argued:

> If Caldwell's personal testimony before the grand jury turns out to be sufficient for the needs of the jury, it may not be necessary for the grand jury to examine the tapes and documents. But a claim of right or privilege by a newspaper reporter summoned as a grand jury witness cannot be made prospectively.

It must be done in response to specific questions asked before the grand jury, according to the government brief. The Justice Department also said there was no judicially recognized journalist's privilege under federal law. The brief said:

> We find it difficult to believe Caldwell is seriously contending that he has a privilege as to these nonconfidential statements not to be called before the grand jury at all. And not even be asked, for example, whether he did write the article, whether statements he attributes to Dave Hilliard were made seriously.[13]

U.S. District Court Judge Zirpoli ruled April 3 that Caldwell 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."[14] The federal judge 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 U.S.[15]

The judge stayed execution of his order until the case could be appealed to the Court of Appeals for the Ninth 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."[16]

Amsterdam, the attorney for Caldwell, said:

> What the court has done by this ruling is to protect any and all confidential disclosures that members of the Black Panthers may have made to Earl Caldwell.
>
> This is important because it allows 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.

Caldwell's professional standing would be utterly destroyed "if his sources could not rely on him to protect their confidence," Amsterdam argued.[17]

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," Woerheide said. And, 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 Woerheide if he would stipulate that 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. Woerheide argued further that it was impossible to set limits on 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 Caldwell could be questioned extensively on matters on which he would not raise a claim of privilege."

In arguing that Caldwell should be forced to testify, Woerheide said, "It is obvious that the government is having trouble developing evidence" in its case against the Black Panthers. He said the government has already granted immunity to three prospective witnesses and applied for immunity for two others.[18] Federal Judge Zirpoli signed an order April 8 limiting the federal government's power of subpoena on Earl Caldwell.[19] The order held that Caldwell should not be required to reveal confidential information or sources developed in his newspaper work. It specifically

protected his confidential relationships with Black Panther leaders as news sources. Judge Zirpoli said Caldwell could consult his attorney during testimony before the grand jury.

The judge left open to the government the right to show in a new hearing that the national interest required Caldwell's testimony if information he had could be obtained in no other way. Judge Zirpoli said that to require testimony from Caldwell based on his confidential relationships with news sources would "damage and impair" the professional activities of other reporters for The New York Times and other news agencies.[20]

Caldwell appealed from this order on April 17. The U.S. Court of Appeals for the Ninth Circuit dismissed without comment the appeal concerning the attempt of the Justice Department to compel Caldwell's appearance before a federal grand jury. The finding was filed May 12 by Judges James R. Browning and Shirley M. Hufstedler.[21] Appeal was dismissed apparently on the ground that the District Court order was not appealable.[22]

The grand jury that was first studying black militant groups was disbanded and a new one was formed on May 7. A new subpoena was issued, and Caldwell and government attorneys attempted to treat the question as entirely new, putting aside Judge Zirpoli's order of April 3. The judge refused to allow this. He applied to the new subpoena, issued May 22, the same conditions applied to the earlier one. Then June 4 he ordered Caldwell to appear. When the reporter did not comply, the order to show cause why he should not be held in contempt was signed.[23]

Earl Caldwell was found guilty June 5 of civil contempt by Federal District Judge Zirpoli for refusing to testify before a grand jury

investigating the Black Panthers. Judge Zirpoli allowed Caldwell to remain free pending appeal of his contempt order. The judge did so despite objections of Victor C. Woerheide, assistant U.S. attorney.[24] The order required that Caldwell be held in jail until he testified or the grand jury finished its inquiry and was dismissed.[25]

"The object of civil contempt is to force compliance," Woerheide argued. "If he is at large pending appeal, that will vitiate the court's finding of contempt." Judge Zirpoli said he would allow Caldwell to remain free but asked the reporter's attorneys to expedite the appeal.

Caldwell was in court June 5 and responded to Judge Zirpoli's questions by affirming that he did not intend to appear before the grand jury. The grounds of the appeal were to be the same as those raised earlier in argument for a motion to quash the subpoena.

First, it was argued that Caldwell's First Amendment privileges would be abridged if the government was permitted to force him to testify about knowledge he gained while gathering material for the newspaper. Second, Amsterdam wanted a court order requiring the government to reveal if it subpoenaed Caldwell because of information picked up in an electronic surveillance of the Black Panthers.[26]

The New York Times filed an amicus curiae brief during the last part of July with the U.S. Court of Appeals for the Ninth Circuit. "The Justice Department has infringed on Earl Caldwell's First Amendment rights as a news reporter by trying to force him to testify in a grand jury investigating the Black Panther party," The Times said. The New York Times was admitted as a party to the lower court proceedings and filed a

brief with the appeals court in support of Caldwell's appeal against the order that he be required to testify at all.[27]

The newspaper did not immediately support Caldwell in his appeal. Caldwell said, "Times felt that Zirpoli decision in the Ninth Circuit was adequate. They did not discourage my position but were hesitant to go along on the appeal. At first they refused in an open memo to the staff but they later reversed themselves."[28]

A. M. Rosenthal, managing editor of The New York Times, distributed the intra-office memorandum June 16, 1970. The Times management decided not to become a party to Caldwell's appeal because it felt that when a reporter refuses to authenticate his story it "would cast some doubt upon the integrity of the Times news stories."[29]

The brief filed by The New York Times in support of Caldwell argued that the government, if it wanted his testimony, must show that the evidence could not be obtained from other sources and that justice would miscarry without that evidence. Because of First Amendment guarantees, the brief argued, a reporter stands differently from other citizens when an attempt is made to force him to testify about matters he learned of in pursuit of his function as a reporter.

The brief argued:

> Without a curb on the government's ability to subpoena newsmen the press would rapidly become the government's investigative arm. Whenever a reporter is compelled by subpoena to appear and testify as to information obtained in his professional capacity, his appearance has an inhibiting effect on his ability and that of other reporters to gather and report the news.

It was asserted in the brief that

> reporters are frequently subpoenaed to provide information otherwise available, merely because it saves parties the effort of collecting the evidence themselves.

> The reporter's testimony adds nothing to the case of the summoning party whose true purpose in subpoenaing the reporter was to give credibility to the evidence of its own witness.

The New York Times cited its experience in subpoenas issued to two other reporters, Donald Janson, in relation to a matter concerning an antiwar coffeehouse in South Carolina, and John Kifner, in a matter concerning destruction of draft board records in Chicago. In both instances, other alternative witnesses were available and the subpoenas were withdrawn after The New York Times protested.

The Caldwell brief said:

> In any First Amendment case it is necessary to balance the interest of the government with that of the public, which is the real beneficiary of the First Amendment freedom of the press.
>
> If the government succeeds in frequently compelling reporters to appear before grand juries and other tribunals, its power to do so will have a significant chilling effect on reporters' news gathering efforts and on the ability of the press fully to report the news.

The order holding Caldwell in contempt should be reversed because there has been no showing that the government had to have Caldwell's evidence, the brief declared.[30]

On November 16, the landmark decision was made that a reporter cannot be ordered to appear before a secret grand jury unless the government demonstrates a "compelling need" for his presence.

Concerning the question of possible electronic surveillance of the Black Panthers and Caldwell, Attorney Amsterdam said:

> Because we won the case in the Court of Appeals upon the First Amendment ground, we have not had occasion to pursue the matter of electronic surveillance any further. However, we have presented to the Supreme Court, as a possible alternative ground for affirmance of the Court of Appeals, the claim that we are entitled to examine government records relating to any such surveillance.[31]

The government then filed a writ of certiorari on December 16 which was granted on May 3, 1971. The question to be presented by the government before the United States Supreme Court is

> Whether the First Amendment bars a grand jury that is investigating possible crimes committed by members of an organization from compelling a newspaper reporter, who has published articles about that organization, to appear and testify solely about non-confidential matters relating to the organization.[32]

Amsterdam, Caldwell's attorney, said:

> The government is not frontally challenging Judge Zirpoli's protective order, but merely the ruling of the Court of Appeals excusing Mr. Caldwell from attendance under the subpoena. At the same time, the government has filed an amicus curiae brief in the two other newsmen's cases which will be argued at the same time as the Caldwell case (Branzburg v. Hayes, O.T. 1971, No. 70-85; and Matter of Pappas, O.T. 1971, No. 70-94) which argues that no newsmen's privilege should be allowed at all.
>
> In the latter regard, the government says essentially that the press has managed to function freely for 200 years in this country without a privilege, and that this proves none is needed--or at least that the need for a privilege is not sufficiently clear so that the Court should establish the privilege on a constitutional footing.[33]

The government in its brief for the United States v. Caldwell stated:

> This Court is thus called upon here to decide only whether a reporter can refuse to appear and testify before a grand jury about matters concededly nonconfidential in nature on the ground that his appearance alone could jeopardize confidential relationships and thereby have a "chilling effect" on the freedom of press guaranteed by the First Amendment.
>
> Even if the Court should hold in Branzburg and Pappas that the First Amendment freedom of the press covers newsgathering in general and authorizes newsmen to refuse to disclose to grand juries confidential associations and private communications in particular, such protection would not warrant the relief respondent seeks in the instant case. For, whatever may be the scope of a reporter's constitutional privilege, it does not justify his refusal to appear before a grand jury to testify only as to matters concededly nonconfidential in nature.
>
> In a published article in The New York Times on December 14, 1969, respondent attributed remarks to David Hilliard which indicated that the Black Panthers intended to pick up guns and move against

the government in "armed struggle"; that they advocated "the very direct overthrow of the government by way of force and violence."

Such statements, we submit, when viewed together with the numerous statements of a similar nature then being made by other members of the Black Panther Party, provided ample basis for a grand jury investigation. It is, of course, well recognized that freedom of speech "may be abused by using speech or press or assembly in order to incite to violence and crime." DeJonge v. Oregon, 299 U.S. 353, 364.

There was, therefore, strong reason to subpoena respondent in this case. His newspaper article was not an editorial; nor was it simply a paraphrase of statements by Hilliard and other members of the Black Panther Party.

It contained, instead, direct quotations which on their face seemed outside the protections of First Amendment free speech. Consequently, it was a proper exercise of the grand jury subpoena power to call respondent to testify, at the very least, that he did indeed hear the words quoted in his articles; that they were made seriously and not in jest.

Moreover, from the published article it appears that he may have other information of a nonconfidential nature which would be of interest to the grand jury. It was in these circumstances entirely reasonable to assume that his testimony could be "important for the protection of the innocent as for the pursuit of the guilty." United States v. Johnson, 319 U.S. at 513.[34]

Support for Earl Caldwell

The interest of the news media in the District Court case was illustrated by the fact that amicus curaie briefs supporting Caldwell and The New York Times were filed by CBS, Associated Press, Newsweek, the Reporter's Committee on Freedom of the Press and the American Civil Liberties Union.

There were affidavits from dozens of newsmen including other Times reporters.[35]

The Associated Press said:

If . . . newsmen are regularly required to produce such information for the use of grand juries, prosecuting attorneys, investigating committees and the like, their sources of confidential information will soon dry up.

Without access to such sources, the role which the newsman has heretofore played in our society, in ferreting out crime,

> corruption, governmental mismanagement, and other matters of legitimate interest and concern will inevitably be restricted and impaired.[36]

Newsweek said, "Nothing less than a full and unqualified privilege to newsmen empowering them to decline to testify as to any information professionally obtained, will truly preserve and protect the newsgathering activities of the media."[37]

Several reporters asserted that it was particularly important for a black newsman covering the black community to obtain confidential information and protect his sources. C. Gerald Fraser, a black reporter for The New York Times, said:

> Because of the cohesiveness of the black activist community, a reporter's credibility is peculiarly important. I know of one black reporter who was sent to cover the activities of black groups at various colleges. When students at one college would learn of his itinerary they would call ahead to the college to let the students there know what they thought of him.[38]

A number of affidavits said that after the federal government started to subpoena newsmen and their records in 1970, some sources became reluctant to give information.

Frank W. Morgan, Boston bureau chief of Newsweek, told about one of his interviews. "My source persisted in refusing to allow me to tape our interview. He asked me what protection he would have if I even took notes and expressed concern that my notes and the full story I filed might be subpoenaed by the government."[39]

Timothy C. Knight, a reporter for ABC News, said he had to cancel a proposed documentary on the Black Panthers after the Panthers insisted that ABC pledge to fight any subpoena issued by the government. The network refused to make the pledge, Knight said, and the Panthers refused to cooperate.[40]

Min S. Yee, a reporter for Newsweek, accompanied a group of young radicals to Cuba where they were volunteering to cut sugar cane. The radicals forced Yee to flee the island and leave all his notes and films behind. In his affidavit, Yee said the radicals told him, "What if Pig Mitchell (Attorney General John N. Mitchell) sticks a gun in your stomach and says, 'Give me your film,' you're going to hand it over, right?"[41]

A group of about 70 black journalists announced in February that they would resist any attempt by the Government to force them to appear before any investigative or law enforcement agency with unpublished or unbroadcast material they had gathered. "We will protect our confidential sources by using every means at our disposal," the journalists said in a statement, the full text of which appeared in advertisements in two Negro newspapers--The Amsterdam News and The York Courier--the next week. The statement was inspired by the Caldwell case. The black journalists' statement specified why they supported Caldwell.

> We feel that he was subpoenaed because it was felt that as a black man he had special access to information in the black community. Thus the role of every black newsman and woman has been put into question. Are we government agents? Will we reveal confidential sources if subpoenaed? Can our employers turn over files or notes if we object?

The statement noted that some news gathering organizations had turned over files and film to grand juries. The signers said they would try to prevent materials obtained by them in the black community from being submitted to law enforcement or investigative agencies. They said:

> We are not the white world's spies in the black community. We are not undercover agents for local, state, or federal law enforcement agencies. We are black journalists attempting to interpret, with as great an understanding and truth as possible, the nation's social revolutions.
>
> Any appearance of a police-newsman "deal" would adversely affect a reporter's credibility in the community. Any appearance of such a "deal" between police and black journalists kills the

> credibility and trust that black reporters have built up over the years. Some white reporters face similar situations, but from our perspective, black and white reporters are not interchangeable. The black reporter, for one thing, goes "home" when he leaves the office to cover a black story.

The statement chided the American Newspaper Guild and Sigma Delta Chi, the professional journalism society, for not taking a vigorous stand on the series of subpoenas served on newsmen.[42]

The American Newspaper Guild reaffirmed its position that newsmen's notes and other confidential material should not be subject to subpoenas. Frank Angelo, managing editor of The Detroit Free Press, who was president of Sigma Delta Chi, said that the criticism of the national journalism society was "unwarranted" because the organization

> has been fighting for freedom of information for several decades.
> The fact is that I, as president, have spoken out against the insidious practice of using subpoenas to try to get at information gathered by reporters. The issue here, of course, is that government efforts tend to undermine the entire relationship between reporters and their sources. Sigma Delta Chi has constantly fought this sort of thing and applauds Earl Caldwell's stand.[43]

A national organization of black journalists was founded June 29 at Lincoln University at Jefferson City, Missouri, and adopted a program to support Caldwell. The group, consisting of 50 journalists representing newspapers, magazines, radio and television personnel throughout the country, called the organization the National Association of Black Media Workers. Caldwell attended the conference of black journalists.

The organization planned to raise funds for an information campaign in connection with the Caldwell case and to solicit support from black and liberal white groups for protests against the charges that the reporter faces. Four major local black journalist groups were to coordinate the activities of the national organization. They included

Black Journalists of the San Francisco Bay area, United Black Journalists of Chicago, Black Perspective of New York City and a group in Nashville.[44]

Delegates to the NAACP's convention in July expressed their "strongest possible opposition of the attempt by the U.S. Justice Department to require Earl Caldwell to testify before a federal grand jury investigating the Black Panther party in San Francisco." In a resolution, the delegates promised to "stand solemnly and resolutely with Earl Caldwell and condemn the Justice Department for attempting to prosecute him." The NAACP resolution stated:

> We believe this stand is fully justifiable to protect the confidential relationship between reporters, black or white, and their sources; to protect the freedom of the press from undue government pressure; to prevent reporters from being used as unwilling informers about the activities and people of their communities; and especially to protect the black reporter from the double jeopardy of unwarranted and unjustified government use of power on the one hand and legitimate suspicions and fears of the black community on the other hand that confidential information might be secured by politically motivated prosecutors through the use of grand jury subpoena powers.[45]

Two black reporters for KQED, an education television station at San Francisco, spoke out after the first subpoena was issued to Caldwell. The reporters, Rush Greenlee and Walt Thompson, spoke as officers of the Bay Area Black Journalists. The issuance of a subpoena to force Caldwell to testify against Black Panther leaders "clearly indicates the web of repression, directed against the Panthers, is being stretched and expanded to envelop all sections of the black community," Greenlee said.[46]

The Urban League passed a resolution of support of Caldwell.[47]

Black Perspective, a black journalists' group in New York City, stated:

The Earl Caldwell case involves principles that are important for all reporters: a newsman's duty to protect his sources, his obligation to resist attempts by government to transform him into an involuntary agent or spy, his responsibility to fight attempts to intimidate or harass mounted by governmental or private agencies. While these issues affect all newsmen, the Caldwell case has a special and particular bearing on black journalists who have access to the black community that white newsmen lack and who, for the most part, return to that community when they leave their city rooms.[48]

CHAPTER V

A SURVEY OF PROFESSIONAL OPINION

Selected news personnel with national media and attorneys who were involved in the events of 1970 pertinent to this study were surveyed to determine if there are differences of opinion between the professions concerning confidential communications.

Names of news media personnel and attorneys were obtained through reading stories about the news media and government subpoenas in the 1970 issues of The New York Times. All are well-known in their professions and leaders in their respective fields. Their opinions probably influence other people, particularly those within their own professions.

Thirty persons--15 journalists and 15 attorneys--were selected to receive a questionnaire.[1] Varied occupations within the respective professions of journalism and law were kept in mind in the selection process.

The questionnaire was sent by certified airmail with a return airmail envelope. Questionnaires and most of the other responses were received within two weeks. Material was pre-coded for identification purposes.

Six news media personnel and five attorneys responded to the questionnaire. Replies of some type, including the questionnaire, were received from nine journalists and 10 attorneys. (See Table 2.) Those who did not send back the questionnaire replied by letter. Some explained their positions by letter only, and some sent helpful legal publications

TABLE 2

QUESTIONNAIRE RECIPIENTS AND RESPONDENTS

QUESTIONNAIRE RECIPIENTS

NEWS MEDIA PERSONNEL

1. Earl Caldwell
   Reporter, New York Times
2. Hedley Donovan
   Editor in Chief, Time
3. Ernest Dunbar
   Senior Editor, Look
4. Osborn Elliott
   Editor in Chief, Newsweek
5. Max Frankel
   Editorial, New York Times
6. Wes Gallagher
   General Director, AP
7. Fred P. Graham
   Law, Reporter, New York Times
8. Gordon Parks
   Photographer, Life
9. A. M. Rosenthal
   Mgr. Editor, New York Times
10. Richard S. Salent
    President, CBS News
11. Arthur Ochs Sulzberger
    Publisher, New York Times
12. H. Roger Tatarian
    News Editor, UPI
13. Walt Thompson
    KQED Education Television
14. Richard C. Wald
    V.P. for News, NBC
15. Mike Wallace
    Correspondent, CBS

ATTORNEYS

1. Anthony Amsterdam
   Law School, Stanford
2. John B. Bates
   New York Times
3. Vince Blasi
   Law School, Michigan
4. Ramsey Clark
   Former Attorney General
5. Norman Dorsen
   New York University, ACLU
6. Bert H. Ealy
   American Bar Association
7. Erwin N. Griswold
   Solicitor General, Justice Dept.
8. James C. Goodale
   New York Times
9. Nicholas Johnson
   Federal Communications Commission
10. John N. Mitchell
    Attorney General, U.S.
11. Louis Pollack
    Law School, Yale
12. Paul Sternbach
    CBS
13. Tedford Taylor
    Law School, Columbia University
14. Jay Topkins
    Attorney
15. Victor C. Woerheide
    Asst. Attorney General, U.S.

QUESTIONNAIRE RESPONDENTS AND OTHER REPLIES

1. Earl Caldwell
2. Osborn Elliott
3. Max Frankel
4. Richard S. Salent
5. H. Roger Tatarian
6. Mike Wallace
7. Hedley Donovan
8. A. M. Rosenthal
9. Richard C. Wald

1. Norman Dorsen
2. Bert H. Ealy
3. Erwin N. Griswold
4. James C. Goodale
5. Nicholas Johnson
6. Anthony Amsterdam
7. Louis Pollack
8. Paul Sternbach
9. Victor C. Woerheide
10. Vince Blasi

and pertinent information. While the direct questionnaire response was small, the overall response was good. One questionnaire was returned because the attorney could not be located.

Questionnaire recipients were asked to answer 10 questions by circling "yes," "no" or "no opinion." Several respondents answered some questions with their own statements rather than circling the form answers. These answers are indicated by "other" in the tables showing responses to the questionnaire. A final open-end question allowed recipients to expand on any feelings they might have about journalists and confidentiality of news sources. Only one newsman and one attorney expressed their thoughts to that question.

Although the number of responses is limited in this study, respondents are people who have influence on many other people. The findings in this study may reflect a large scope. This study tends to bear out the decisions and indecisions discussed in other parts of this thesis.

TABLE 3

HARASSMENT AGAINST NEWS MEDIA

1. Do you think there was harassment against the news media during 1970 by federal law enforcement officials?

	Yes	No	No Opinion	Other
Journalists	5			1
Attorneys	4	1		

Both journalists and attorneys believed there was harassment against the news media during 1970 by federal law enforcement officials.

A wire service editor said, "I would hesitate to say that federal officials set out to harass newsmen. In their interpretation of their roles, they took steps that in some instances were regarded by newsmen as harassment. That is not the same thing."

The attorney who did not think there was harassment is with the Justice Department.

TABLE 4

USE OF SUBPOENAS AND THE RADICAL MOVEMENT

2. In your opinion, did the federal government use the subpoena as an attempt to cut off the radical movement from the established news media?

	Yes	No	No Opinion	Other
Journalists	4	2		
Attorneys	1	2	1	1

News media personnel tended to think the federal government used the subpoena to cut off the radical movement from the established news media. A newspaper editorial writer and a wire service editor did not agree with this assumption.

Attorneys were divided. Both a government attorney and one involved with the defense of Earl Caldwell said "no." Another said, "Maybe, although those who were involved may not realize it themselves."

TABLE 5

AVAILABILITY OF REPORTERS' NOTES, UNUSED PICTURES, TELEVISION OUT-TAKES AND COMPLETE RECORDS AND FILES TO GOVERNMENT AUTHORITIES

3. Should the following be available to government authorities:

		reporters' notes	unused pictures	television out-takes	complete records and files
Journalists	Yes				
	No	6	6	6	6
	No Opinion				
	Other				
Attorneys	Yes	1	1	1	1
	No	3	3	3	3
	No Opinion				
	Other	1	1	1	1

All journalists agreed that reporters' notes, unused pictures, television out-takes, and complete records and files should not be available to government authorities.

Attorneys tended to agree. A government attorney said these items should be available "in proper circumstances." He did not elaborate. Another attorney said "sometimes."

TABLE 6

NEWSMEN AND APPEARANCES BEFORE SECRET GRAND JURIES AND OPEN COURTS

4. Should a newsman appear

		before a secret grand jury when subpoenaed about his news information?	before an open court when subpoenaed about his news information?
Journalists	Yes	1	3
	No	4	2
	No Opinion		
	Other	1	1
Attorneys	Yes	2	2
	No	2	2
	No Opinion		
	Other	1	1

News media employees tended to agree that a newsman should not appear before a secret grand jury when subpoenaed about his news information.

A wire service editor said:

> I believe a newsman, like any citizen, must appear before a grand jury in response to a subpoena. Certainly he should not be reluctant to testify about anything that he has included in his reportage. The only question is whether a reporter having responded to a subpoena, should testify when questions try to reach into the area of confidentiality. This would be covered by question three.

A national magazine editor said it "depends" and did not explain further.

Attorneys were divided in their answers about a grand jury appearance while one attorney said "sometimes."

News people were not in agreement about whether a newsman should appear before an open court when subpoenaed about his news information. Earl Caldwell, who got a court ruling saying he did not have to appear before a grand jury unless the government could prove "compelling need," said a newsman should appear before an open court when subpoenaed about his news information "if he witnessed a crime or something like that."

A network television correspondent said, "A newsman should not appear before a secret grand jury but should appear before an open court when subpoenaed about his news information." But he noted, "only to verify his published reports." A magazine editor again said it "depends." An appearance should be made in response to a subpoena, according to a wire service editor. A network news president and a newspaper editorial writer were consistently opposed to having newsmen appear either before a secret grand jury or open court when subpoenaed about news information.

Attorneys also were divided but each was consistent in his answers concerning both a secret grand jury and an open court.

An attorney who helped defend Caldwell said "no" to both questions while the government attorney said "yes." Another attorney said "yes" a newsman should appear before an open court when subpoenaed about his news information "under certain circumstances." He did not explain further. And another attorney again said "sometimes."

TABLE 7

TESTIMONY BY REPORTERS ABOUT A CONFIDENTIAL THREAT OF CRIME

5. If a reporter has heard a confidential threat of crime, should he testify

		before a secret grand jury	before an open court
Journalists	Yes		
	No	1	1
	No Opinion		
	Other	5	5
Attorneys	Yes	3	3
	No	1	1
	No Opinion	1	1
	Other		

Among media personnel responding, only a network television correspondent made a direct answer which was "no" concerning if a reporter should testify before a secret grand jury or open court if he heard a confidential threat of crime.

Earl Caldwell said, "I don't believe a reporter would take that kind of information on a confidential basis--at least I wouldn't." A wire service editor said, "Many people make threats which are never carried out. If confidential statements are to be considered inviolate, that should extend to confidential threats as well as anything else." A network news president said it "depends on the nature of the crime." A

newspaper editorial writer said "sometimes" and did not elaborate. A national magazine editor said it "depends" and did not explain further.

Attorneys tended to think that if a reporter has heard a confidential threat of crime, he should testify before a secret grand jury and an open court. An attorney who helped defend Caldwell said "no" to both. A Federal Communications Commission member had "no opinion."

TABLE 8

TESTIMONY BY REPORTERS ABOUT WITNESSING A CRIME

6. If a reporter witnesses a crime, should he testify

		before a secret grand jury	before an open court
Journalists	Yes	3	3
	No		
	No Opinion		
	Other	3	3
Attorneys	Yes	3	3
	No	1	1
	No Opinion	1	1
	Other		

Half of the journalists said "yes" that if a reporter witnesses a crime, he should testify before a secret grand jury and an open court.

A network television correspondent, who said a reporter should not testify if he heard a confidential threat of crime, said a reporter should testify if he witnesses a crime. A national magazine editor who

said it "depends" concerning a confidential threat of crime said a reporter who witnesses a crime should testify.

Earl Caldwell said, "If I witnessed a crime I'd act just the same as any other citizen." A network news president said it "depends on the nature of the crime." He said the same about hearing a confidential threat of crime. A newspaper editorial writer said "sometimes" as he did with hearing a confidential threat of crime.

Attorneys' answers were consistent concerning a reporter witnessing a crime with those given concerning a reporter hearing a confidential threat of crime. They tended to think a reporter should testify before a secret grand jury and an open court if he witnesses a crime.

TABLE 9

LEGAL OBLIGATIONS OF NEWSMEN TO TESTIFY IN GRAND JURY OR COURT PROCEEDINGS

7. Should a newsman have the same legal obligations as any citizen to testify in grand jury or court proceedings?

	Yes	No	No Opinion	Other
Journalists		4		2
Attorneys	1	3	1	

Journalists did not think a newsman has the same legal obligations as any citizen to testify in grand jury or court proceedings. Two journalists did not give direct answers.

Attorneys tended to agree that a newsman does not have the same legal obligations. One attorney said a newsman did not have the same legal obligations as any citizen "so long as necessary to protect free

press." An attorney for Caldwell's defense said, "no" to the question while the government attorney said a newsman does have the same legal obligations as any citizen. A Federal Communications Commission member expressed "no opinion."

TABLE 10

LIMITATIONS OF PRIVILEGED COMMUNICATIONS OF JOURNALISTS

8. Should the journalist himself decide on the limitations of privileged communications?

	Yes	No	No Opinion	Other
Journalists	3	1		2
Attorneys		4	1	

News people, if they expressed an opinion, tended to favor the idea that the journalist himself should decide on the limitations of privileged communications. These included a newspaper editorial writer, a national magazine editor and a network television correspondent.

A network news president said the journalist should not decide on the limitations of privileged communications. Caldwell said, "This is currently under study by a reporters' group. Because it is, I'll withhold comment."

Attorneys, if they expressed opinion, did not think the journalist himself should decide on the limitations. A Federal Communications Commission member had "no opinion."

TABLE 11

NEED OF A SUPREME COURT RULING DEFINING PRIVILEGED COMMUNICATIONS FOR NEWSMEN

9. Should there be a Supreme Court ruling defining privileged communications for newsmen?

	Yes	No	No Opinion	Other
Journalists	4		1	1
Attorneys	4		1	

Journalists and attorneys agreed that there should be a Supreme Court ruling defining privileged communications for newsmen.

A newspaper editorial writer had "no opinion" as did a Federal Communications Commission member. Caldwell declared, "The Constitution is clear--don't you think so."

News media personnel agree that there should be some type of shield law for newsmen. (See Table 12.) Only a newspaper editorial writer expressed "no opinion."

Attorneys almost were split concerning a shield law for newsmen. An attorney who defended Caldwell and a government attorney both said there should not be any shield law for newsmen.

All the journalists agreed that there should be federal shield law. Of the attorneys who favored a shield law, all agreed there should be a federal law.

News people tended to think each state should have its own shield law. Attorneys were divided about state shield laws. An attorney who said "yes" favored state shield laws "only if there is no federal law."

TABLE 12

NEED OF A SHIELD LAW FOR NEWSMEN

10. Should there be some type of shield law for newsmen?					
		Yes	No	No Opinion	Other
Journalists		5		1	
Attorneys		3	2		
If yes,					
		should there be a federal shield law?		should each state have its own shield law?	
Journalists	Yes	5		3	
	No			1	
	No Opinion				
	Other			1	
Attorneys	Yes	3		1	
	No				
	No Opinion			1	
	Other			1	

Summary

Journalists and attorneys appeared to agree on five points. Both journalists and attorneys believed:

• There was harassment against the news media during 1970 by federal law enforcement officials.

• Reporters' notes, unused pictures, television out-takes, and complete records and files should not be available to government authorities.

• Newsmen should not have the same legal obligations as any citizen to testify in grand jury or court proceedings.

• There should be a Supreme Court ruling defining privileged communications.

• There should be a federal shield law.

The only time either one of the groups was in total agreement was when all journalists agreed that reporters' notes, unused pictures, television out-takes and complete records and files should not be available to government authorities.

Attorneys tended to be divided several ways on at least half the questions.

Expanding about his feelings, a network television correspondent said:

> We have to keep on insisting on the unavailability of reporters' notes, film out-takes, records, etc. The one case in which, I believe, a reporter should be responsive is in the case of the need of a court to verify information already published.
>
> The grand jury offers special difficulties, however, for if a reporter goes into that grand jury room, he is suspect of having been responsive to more than just verification.

An attorney said, "Confidentiality is justified in the protection of press freedom. The delicate balance between freedom and tyranny requires protection, but this must be balanced against the safeguards and responsibilities necessary to the preservation of a free society."

CHAPTER VI

CONCLUSION

What did the year of 1970 mean for Earl Caldwell?

> My feelings are those of disillusionment, I guess. I never thought all this could happen. I didn't believe the government could--or would--put a reporter in a position where he had to become a spy or agent. But it did.
>
> I felt that jail was not only possible but probable. For almost a year, work was almost impossible. Court, the anxiety, trying to build support, etc., all took time.[1]

As Sen. James Pearson said in introducing the "Newsmen's Privilege Act of 1971," "It is a curious state of affairs when newsmen, in exercising their right to be part of a 'free press,' must, from time to time, serve terms in prison for contempt of court."[2]

As with Caldwell, events around 1970 were trying for others. NBC and CBS and their wholly owned stations, for example, were issued 123 subpoenas from February 1969 through July 1971. Many of these involved grand jury investigations. Almost all of these subpoenas asked for blanket access to film and tapes covering whatever investigation the subpoena suggested. Most of the subjects concerned radical activities.[3] One television channel contended that the search for and reproduction of film strips requested by various courts had cost the station $155,000 in overtime and equipment.[4] Chicago Sun-Times Reporter Duane Hall was subpoenaed to testify in 11 separate proceedings within 18 months.[5]

Perhaps it was the social and political temper of the times which brought about the abundance of subpoenas. Maybe it will not happen again.

But the news media should not have to live with the atmosphere of a form of government control via subpoenas at any time.

The author believes that if federal agencies are going to subpoena a reporter's notes as an attempt to use him as a law enforcement official or an investigative arm of the state, then newsmen should be able to invoke privilege. A confidential source of information also should not have to fear ending up in court for giving a news tip or background information for a news story.

A newsman called, because of his employment, as a witness before a legal proceeding is not an ordinary witness. He is a professional carrying out a Constitutional function of keeping citizens informed. Some information would be lost to the public if identities of sources were required to be revealed and confidentiality of certain information was not assured.

The "peculiar" situation of the news media arise from special circumstances reporters and cameramen have in the pursuit of information. Even at public events, they are given special access to persons in the news and special permission to pass through police lines. They can see and hear things not intended for the public eye or ear.

In private associations with persons in the news, reporters obtain not only on-the-record statements but also confidential judgments and facts that they use to appraise the meaning of situations.

Politicians with secrets, officials who fear superiors and persons who fear persecution or prosecution would refuse to admit reporters to their confidences if they felt they would be betrayed at the command of the government.

Senator Pearson said:

> Newsmen cannot meet their obligation as members of the press without full opportunity to gather newsworthy information from confidential sources. The gathering of pertinent information prior to publication constitutes an inseparable and indispensible phase of the overall news effort. It is axiomatic that there can be no dissemination of information without collection of information. Therefore, unreasonable governmental interference with the collection of newsworthy information is inimical to a free press.[6]

The Supreme Court has said that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society."[7]

Grand jury proceedings which may involve questioning of newsmen or supplying unpublished materials should require a showing to a court of necessity and exhaustion of other sources before a subpoena is issued.

Several news organizations, as amici curiae before the Supreme Court in United States of America v. Earl Caldwell, argued:

> A reporter cannot, consistently with the Constitution, be made to divulge confidences to a governmental investigative body unless three minimal tests have all been met:
>
> A. The government must clearly show that there is probable cause to believe that the reporter possesses information which is specifically relevant to a specific probable violation of law.
>
> B. The government must clearly show that the information it seeks cannot be obtained by alternative means, which is to say, from sources other than the reporter.
>
> C. The government must clearly demonstrate a compelling and overriding interest in the information.[8]

The brief of another group of news organizations stated:

> We concede the possibility that there may exist a situation where a particular crime will go unpunished, or a potentially dangerous activity go uninvestigated, if this court grants the relief here sought by Caldwell. While this, indeed, may be the case, we believe it a price which must be paid if the First Amendment is to be respected in the same way as we pay the price for such constitutional protections as the Fourth, Fifth and Fourteenth Amendments. And the absence of any convincing demonstration by the government that recognition of journalists' protection has in fact in the past, or has in fact in the cases at bar, proven an

> insurmountable obstacle in criminal prosecution, serves to further assure this court that recognition of journalists' protection as embodied in the First Amendment will fully serve the public interest.[9]

• The opinion of the appeals court in the Earl Caldwell case should stand.

• The Supreme Court, in its opportunity now to speak to newsmen's privilege, should define privileged communications for the profession to alleviate confusion.

• The companion federal shield laws proposed in the 92nd Congress should be passed, especially if the Supreme Court rules unfavorably toward journalists.

Vince Blasi, University of Michigan law professor who is completing a study about newsmen and subpoenas, sums up the current situation for journalists.

> Newsmen have everything to lose and very little to gain from the pending Supreme Court cases. Should the justices establish a qualified privilege (an absolute privilege is out of the question given the Court's present make-up), they would only ratify the existing equilibrium. Should they, on the other hand, give their imprimatur to the practice of subpoenaing the press, they would unleash furies that are currently under control.
>
> If the Supreme Court were to reject the newsman's bid for a privilege, the local prosecutors, defense lawyers and civil litigants would probably be less reluctant to subpoena the press if the prospect of a long constitutional fight were removed. Editorial writers could no longer rely on the First Amendment to rally public opinion behind their embattled brethren in the newsroom. Journalists accepting contempt citations might find judges more willing to impose stiff sentences. In such a climate, every reporter who was queried believes that many source relationships would become more structured, more self-conscious, more riddled with suspicion and less conducive to quality reporting.[10]

Further Study

It would be ideal if there could be a standard basis of reference for judges, attorneys and news media personnel concerning subpoenas and

newsmen's privilege. A committee of journalists and attorneys need to work together and conclude such a study. It would be helpful, especially if the Supreme Court does not favor newsmen in its rulings and if Congress does not pass federal legislation concerning newsmen's privilege.

Studies for more information and thought would be helpful concerning the types of news stories which attract subpoenas, why subpoenas are issued, what is accomplished by the issuance of subpoenas, and do sources of information become reluctant to talk with newsmen.

Studies also are needed to analyze the effectiveness of state shield laws for newsmen. Are they needed? If not, what protection, if any, should a journalist have concerning sources of information and confidential information?

Content analysis of newspapers could be done to indicate the actual use of anonymous sources.

When the current controversy subsides, in-depth analysis in books of this period in journalism and law would help to put it all in perspective.

REFERENCES

REFERENCES

Introduction

[1]See Appendix A.

[2]Blair v. United States, 250 U.S. 273, 281 (1918).

[3]See Appendix A.

[4]Caldwell v. United States, 434 F 2d 108 (9th Cir. Nov. 16, 1970).

[5]See Appendix B.

[6]Caldwell v. United States, 434 F 2d 108 (9th Cir. Nov. 16, 1970).

[7]Letter from Earl Caldwell, Sept. 21, 1971.

Chapter I

[1]The following cases involved the question of a newsman's privilege: People ex rel. Phelps v. Fancher 2 Hun. 226 (N.Y. 1874); Pledger v. State, 77 Ga. 242, 3 S.E. 320 (1887); People v. Durant, 116 Cal. 179, 48 Pac. 75 (1897); Ex parte Lawrence et al., 116 Cal. 298, 48 Pac. 124 (1897); Plunkett v. Hamilton, 136 Ga 72, 70 S.E. 781 (1911); In re Grunow, 84 N.J.L. 235, 85 Atl. 1011 (1913); In re Wayne, 4 Hawaiian Dist. Ct. 475 (1914); Joslyn v. People, 67 Colo. 297, 185 Pac 657 (1919); People ex rel. Mooney v. Sheriff of New York County, 269 N.Y. 291, 199 N.E. 415 (1936); State v. Donovan, 129 N.J.L. 478, 30 A. 2d 421 (1943); Clein v. State, 52 So. 2d 117 (1950); Rosenberg v. Carroll, In re Lyons, 99 F. Supp. 629 (1951); Ex parte Sparrow, 14 F.R.D. 351 (1953); In re Howard, 136 Cal. app. 2d 816, 289 P. 2d 537 (1955); Brogan v. Passaic Daily News, 22 N.J. 139, 123 A. 2d 473 (1956); Brewster v. Boston Herald-Traveler Corp., 20 F.R.D. 416 (1957); Garland v. Torre, 259 F. 2d 545 (1958), Cert. denied 358 U.S. 910 (1958); In re Goodfader's Appeal, 45 Hawaii 317, 367 P. 2d 472 (1961); Murphy v. Colorado, 365 U.S. 843 (1961); In re Taylor, 193 A. 2d 181 (1963); Beecroft v. Point Pleasant Printing and Pub. Co., 197 A. 2d 416 (1964); Application of Cepeda, 233 F. Supp. 465 (1964); State of Oregon v. Buchanan, 250 Or. 244, 436 P. 2d 729 (1968).

[2]Tyron v. Evening News Association, 39 Mich. 638 (1878).

[3]In the Matter of Wayne, 4 Hawaii Dist. Ct. 475 (1914); Eddie Barr (unreported), New York Times, March 13, 1931, p. 25, cited by W. D. Lorenson, "The Journalist and His Confidential Source: Should a Testimonial Privilege Be Allowed," Nebraska Law Review, 35: 578, May 1956.

[4]Caldwell v. United States, 434 F 2d 108 (9th Cir. Nov. 16, 1970).

[5]Blair v. United States, 250 U.S. 273 (1918).

[6]259 F. 2d 545 (2d Cir.), cert. denied, 358 U.S. 910 (1958).

[7]Colo. Sup. Ct., Murphy v. Colorado, cert. denied, 365 U.S., 843 (1961).

[8]367 P. 2d 472 (Sup. Ct. Hawaii 1961).

[9]250 Or. 244, 436 P. 2d 729 (1968) cert. denied, 392 U.S. 905, 88 S. Ct. 2055 (1968).

[10]People ex rel. Phelps v. Fancher, 2 Hun. 226 (N.Y. Sup. Ct. 1874).

[11]Burdick v. United States, 236 U.S. 79 (1915).

[12]See Appendix A.

[13]269 N.Y. 291, 199 N.E. 415 (1936).

[14]412 Pa. 32, 193 A. 2d 181 (1963).

Chapter II

[1]Md. Code Ann., Art. 35, Ch. 249 (1896).

[2]John T. Morris (unreported), Editor and Publisher (Sept. 1, 1934), p. 9, as cited by Bowie K. Kuhn, "Right of a Newsman to Refrain from Divulging Sources of His Information," University of Virginia Law Review (February 1950), 36:61-83.

[3]See Appendix C for 17 state statutes granting reportorial privilege.

[4]Walter A. Steigleman, The Newspaperman and the Law (Dubuque, Iowa: William C. Brown Company, 1959), pp. 201-2.

[5]Freedom of Information Center Publication No. 116, Reporters' Privilege Worldwide (Columbia, Missouri: University of Missouri, 1964), p. 3.

[6]Ramutis R. Semeta, "Journalist's Testimonial Privilege," 9 Clev.-Mar. L. Rev. 311 (May 1960).

[7]Freedom of Information Center Publication No. 116, p. 3.

[8]Jerome A. Barron and Donald M. Gillmore, Mass Communication Law (St. Paul, Minn.: West Publishing Co., 1969), p. 238.

[9]Freedom of Information Center Publication No. 116, p. 4.

[10]Ibid., p. 4.

[11]The International Press Institute Report, Professional Secrecy and the Journalist (Zurich: Frederick A. Praeger, Inc., 1962), pp. 175-76.

[12]Steigleman, p. 196.

[13]Zechariah Chafee, Jr., Government and Mass Communications, Vol. II (The University of Chicago Press, Chicago, 1947), p. 830.

[14]Quill, Vol. 59, No. 7 (July 1971), p. 15. Also see p. 28 of this thesis.

Chapter III

[1]New York Times, Nov. 14, 1969, p. 1.

[2]The CBS News Poll, Ser. 70, No. 1, Rept. 2, March 20, 1970.

[3]New York Times, Oct. 7, 1970, p. 27.

[4]New York Times, Oct. 15, 1970, p. 22.

[5]New York Times, Nov. 18, 1970, p. 48.

[6]New York Times, Feb. 1, 1970, p. 24.

[7]New York Times, Jan. 26, 1970, p. 1.

[8]New York Times, Jan. 27, 1970, p. 87.

[9]New York Times, Feb. 4, 1970, p. 1.

[10]New York Times, Jan. 27, 1970, p. 87.

[11]New York Times, Feb. 4, 1970, p. 1.

[12]Ibid.

[13]Ibid.

[14]New York Times, Feb. 5, 1970, p. 62.

[15]Nicholas Johnson, Federal Communications Commission, "Subpoenas, Out-takes and Freedom of the Press: An Appeal to Media Management," prepared for delivery to the Washington Nieman Fellows, Feb. 12, 1970.

[16]New York Times, Feb. 8, 1970, p. 23.

[17]See Appendix D, as cited in The New York Times, Feb. 6, 1970, p. 40.

[18]New York Times, Feb. 5, 1970, p. 1.

[19]New York Times, March 2, 1970, p. 41.

[20]See Appendix E, John N. Mitchell, Attorney General of the United States, "Free Press and Fair Trial: The Subpoena Controversy," address before the House of Delegates, American Bar Association, St. Louis, Mo., Aug. 10, 1970.

[21]Ibid.

[22]Ibid.

[23]New York Times, Oct. 14, 1970, p. 28.

[24]Editor and Publisher, Vol. 104, No. 7, Feb. 13, 1971, p. 11.

[25]Report of the 1970 Sigma Delta Chi Advancement of Freedom of Information Committee, p. 10.

[26]Quill, Vol. 59, No. 7, July 1971, p. 15.

[27]Editor and Publisher, Vol. 104, No. 6, Feb. 6, 1971, p. 11.

[28]American Newspaper Publishers Association General Bulletin, No. 11, Feb. 25, 1971.

[29]H.R. 4271, 92nd Cong., 1st Sess. (1971).

[30]S. 1311, 92nd Cong., 1st Sess. (1971).

[31]New York Times, May 13, 1970, p. 38.

[32]Ibid.

Chapter IV

[1]Caldwell v. United States, 434 F 2d 108 (9th Cir. Nov. 16, 1970).

[2]New York Times, Nov. 18, 1970, p. 1.

[3]Caldwell v. United States, 434 F 2d 108 (9th Cir. Nov. 16, 1970).

[4]New York Times, Nov. 18, 1970, p. 1.

[5]New York Times, Feb. 3, 1970, p. 20.

[6]New York Times, Feb. 11, 1970, p. 18.

[7]New York Times, Feb. 6, 1970, p. 1.

[8]Ibid.

[9]Ibid.

[10]New York Times, March 18, 1970, p. 28.

[11]See Appendix B.

[12]New York Times, March 18, 1970, p. 28.

[13]New York Times, April 2, 1970, p. 20.

[14]See Appendix F, 311 F. Supp. 358 (N.D. Cal. 1970).

[15]311 F. Supp. 358 (N.D. Cal. 1970).

[16]New York Times, April 4, 1970, p. 1.

[17]New York Times, April 4, 1970, p. 1.

[18]Ibid.

[19]See Appendix G as cited in New York Times, April 10, 1970, p. 22.

[20]New York Times, April 10, 1970, p. 22.

[21]Caldwell v. United States, C.A. 9, No. 25802 (May 12, 1970).

[22]Caldwell v. United States, 434 F 2d 108 (9th Cir. Nov. 16, 1970).

[23]New York Times, June 5, 1970, p. 7.

[24]New York Times, June 6, 1970, p. 2.

[25]Under Rule 6(g), F.R. Cr.P., no regular grand jury may serve more than 18 months. As cited in United States of America v. Earl Caldwell, Supreme Court of the United States, October Term 1971, No. 70-57.

[26]New York Times, June 6, 1970, p. 2.

[27]New York Times, July 26, 1970, p. 47.

[28]Letter from Earl Caldwell, Sept. 21, 1971.

[29]Paul J. Buser, "The Newsman's Privilege: Protection of Confidential Sources of Information Against Government Subpoenas, Saint Louis University Law Journal, Vol. 15, No. 1 (Fall, 1970), p. 195.

[30]New York Times, July 26, 1970, p. 47.

[31]Letter from Anthony G. Amsterdam, Sept. 17, 1971.

[32]United States of America v. Earl Caldwell, Supreme Court of the United States, October Term, 1971, No. 70-57.

[33]Letter from Anthony G. Amsterdam, Sept. 17, 1971.

[34]United States v. Caldwell, Supreme Court of the United States, October Term, 1971, No. 70-57.

[35]New York Times, April 4, 1970, p. 1.

[36]New York Times, April 2, 1970, p. 10.

[37]Ibid.

[38]New York Times, April 5, 1970, p. 28.

[39]Ibid.

[40]Ibid.

[41]Ibid.

[42]New York Times, Feb. 14, 1970, p. 31.

[43]Ibid.

[44]New York Times, June 29, 1970, p. 24.

[45]New York Times, July 4, 1970, p. 9.

[46]New York Times, Feb. 11, 1970, p. 18.

[47] New York Times, July 23, 1970, p. 28.

[48] Race Relations Reporter, Nashville, Tenn., July 16, 1970.

Chapter V

[1]See Table 2, p. 52, and Appendix H.

Chapter VI

[1]Letter from Earl Caldwell, Sept. 21, 1971.

[2]117 Cong. Rec. 41 (March 23, 1971) (Remarks of Sen. James Pearson).

[3]United States v. Earl Caldwell, Supreme Court of the United States, October Term, 1971, No. 70-57.

[4]New York Times, Feb. 1, 1970, p. 24.

[5]United States v. Earl Caldwell, Supreme Court of the United States, October Term, 1971, No. 70-57.

[6]117 Cong. Rec. 41 (March 23, 1971) (Remarks of Sen. James Pearson).

[7]Associated Press v. United States, 326 U.S. 1, 20 (1945).

[8]United States v. Earl Caldwell, Supreme Court of the United States, October Term, 1971, No. 70-57.

[9]Ibid.

[10]Quill, Vol. 59, No. 11, November 1971, p. 9.

APPENDICES

APPENDIX A

AMENDMENTS RELEVANT TO STUDY

Article I

Freedom of Religion, of Speech, and of the Press: Right of Petition. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; of abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Article V

Criminal Proceedings. No person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war, or public danger; nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article VI

Criminal Proceedings. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence.

Article XIV

Civil Rights; Apportionment of Representatives: Political Disabilities: Public Debt.

Section 1. Civil Rights. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

STORY ABOUT BLACK PANTHERS BY EARL CALDWELL,

THE NEW YORK TIMES, DEC. 14, 1969

Declining Black Panthers Gather New Support From

Repeated Clashes With Police

Berkeley, Calif., Dec. 13--It is well past midnight and quiet out on Shattuck Avenue. The liquor store at the corner is empty, and the lights are already out in the barbeque shop next door.

But up in the middle of the block, up there in the two-story brownstone that the Black Panther party occupies, a dash of yellow light slips through an upstairs window.

They are still there, up there in those cluttered, noisy rooms behind windows covered with huge steel plates and walls lined with bulging, dusty sandbags.

All of them are women, and they are busy at filing cabinets and at electric typewriters and mimeograph machines. They are young, some of them very, very young, and as they work they listen to a tape of a speech that Eldridge Cleaver gave more than a year ago. But there are no men, only the women.

"That's because the men are in jails," explains David Hilliard, the party's national chief of staff. "In jails or in graveyards."

There is a redness in his eyes, and he dabs at them wearily.

"Right now," he says, "there are more women in this chapter than men."

Trouble With Police

The weariness in Mr. Hilliard's voice and the siege-like atmosphere of the headquarters here is testimony to the clashes the Panthers have been having in recent months with police departments around the country. Many Panthers have been killed--the party says the total is 28--in such incidents since January, 1968. The Justice Department says the figure is exaggerated.

These widespread clashes, which law enforcement officials assert were not co-ordinated, have sapped the strength of the party. But they also appear to have generated broader support--from both the black and white communities--than the Panthers were ever able to muster before.

A group of national organizations, for instance, now is planning a private investigation of the violent incidents between the Panthers and the police across the country. Former Supreme Court Justice Arthur J. Goldberg and Roy Wilkins, executive director of the National Association for the Advancement of Colored People, will announce details of the private inquiry Monday. The Justice Department just yesterday ordered a preliminary investigation of shootings last week involving the Panthers and the Chicago police.

And in New York today, Congressman Edward I. Koch, speaking at an antiwar rally, said:

"I don't agree with goals or methods of the Black Panthers, but civil liberties transcend the issue of the Panthers' goals." He urged a federal investigation of the Chicago shootings.

Panther sources say that at its peak, the party had 35 chapters across the country, with some 5,000 members. Now, they say there are about half that many members. They attribute this to the troubles with the police and to the party's own purge of "undesirable" members early this year.

Three years have passed since the Black Panther party was organized, years of tumult and change.

Back in 1966 the Panthers, with their black leather jackets, berets and black trousers, were generally looked on as little more than a street gang.

Joseph L. Alioto, the Mayor of San Francisco dismissed them as "a bunch of hoodlums." There were many whites and many blacks who agreed.

But in the years since, they have become a force in almost every major city, prompting J. Edgar Hoover, Director of the Federal Bureau of Investigation, to brand them as the "greatest threat" to the internal security of the country.

The Panthers themselves make no attempt to mask their revolutionary doctrine.

Guns for Revolution

"We are special," Mr. Hilliard said recently. "We advocate the very direct overthrow of the government by way of force and violence. By picking up guns and moving against it because we recognize it as being oppressive and in recognizing that we know that the only solution to it is armed struggle."

In their role as the vanguard in a revolutionary struggle, the Panthers have picked up guns.

Last week two of their leaders were killed during the police raid on one of their offices in Chicago. And in Los Angeles a few days earlier, three officers and three Panthers were wounded in a similar shooting incident. In these and in some other raids, the police have found caches of weapons, including high-powered rifles.

Panther leaders steadfastly maintain that it is the police who attack them and that this is part of a systematic plan to commit genocide against black people.

The police tell another story. They accuse the Panthers of provoking when not actually initiating the shootings. And they maintain that the Panther program is nothing more than a declaration of war against authority, particularly the police.

The Panthers are no longer regarded as just a street gang. White radicals, particularly students, regard them as the center of their movements. And blacks, while they tend to disagree with much of the revolutionary doctrine espoused by the young militants, increasingly see them as the victims of unwarranted police attacks.

When blacks ask what they can do, the Panthers answer: "Arm yourselves."

Leadership Cut

The consistent clashes with the police have depleted the Panther ranks. The founders and most of the leaders who were prominent in the organization are either dead or in prison. In many chapters, women now are as prominent as the men.

Supporters exhort the Panthers to run, to go underground and wait until the pressure eases. But they refuse.

"We're not going to run," Mr. Hilliard said. "We intend to stay right here and keep our offices open and to keep on resisting. We are prepared to lose more members, to go to jail and to be shot in the streets to bring this repressive system to a grinding halt."

While the continued clashes with the police have hurt the Panthers, the party appears now to have as much power and influence as ever.

In part, this is due to the success the Panthers have had in establishing their jailed leaders as martyrs.

On the walls of abandoned buildings on any ghetto street there are likely to be posters of Huey P. Newton, the Panther minister of defense and one of its cofounders who was imprisoned last year in the shooting of an Oakland policeman.

'Soul on Ice'

Eldridge Cleaver, the Panther leader who went into exile last year rather than be returned to prison as a parole violator, left the country at the time his book "Soul on Ice" was a national bestseller.

Bobby Seale, party chairman, a cofounder and the party's chief organizer, won the respect of many blacks and others for the rage with which he spoke out in Chicago during the trial for allegedly conspiring to riot during the Democratic National Convention. He was sentenced to four years for contempt. He is also being held on charges of conspiring to commit murder.

The Panthers although often described as "street blacks," flood the radical student movements with their literature. Last summer they held a national conference in Oakland. Their most powerful weapon at present appears to be a newspaper that has a reported circulation of 75,000 weekly.

Adding to the influence of the Panthers has been their ability to survive.

"By now," an observer noted, "any other black group would have gone out of business. For them just to survive says a lot."

The Panthers are often compared with the Student Nonviolent Coordinating Committee when it was led by H. Rap Brown.

Different Types

"But when the pressure was on Snick, they folded," the Panthers say.

One clear difference between the two groups is in their memberships. For the most part, the coordinating committee was comprised of young, college-educated blacks. The Panthers are from the ghetto streets and many of them have police records.

A closer look shows that many old Student Nonviolent Coordinating Committee members, since that organization all but ceased to function, have fallen into positions within the establishment. Some teach in universities and others are in business or involved in research projects.

The Panthers go to jail, but jail would probably be on their agenda even if they were not Panthers, those who have examined the organization membership contend.

A black writer in San Francisco who has followed the Panthers for several years said that "on at least two occasions" the Panthers were close to folding but that support rallied because of police clashes kept them going.

After the incidents last week, young whites in the San Francisco Bay area showed their support for the Panthers by holding around-the-clock vigils in front of the various Panther offices.

At the same time, white lawyers here have been spending nights in the Panther offices.

"We feel this will be a deterrent to lawless raids by the police on Panther headquarters," Allan Brotsky, one of the lawyers, explained.

While a sizable segment of the black community expressed outrage at the police movement against the Panthers, most blacks at this point do not appear to accept much of the Panther rhetoric.

The Panthers describe themselves as revolutionary socialists and say that the ultimate aim of their socialism is Communism.

"We can't talk about establishing a communistic system before the prerequisite socialism has been employed," Mr. Hilliard, explained. He said that it is socialism that prepares the masses of people for the system of Communism.

Part of the change in the Panthers is reflected in the organization's chief programs, its operation of free clinics and the serving of free breakfasts each morning to black children.

Another notable difference is the party's attitude toward whites. It is not unusual now to see whites around the Panther offices. And at rallies, meetings and demonstrations, the Black Panthers and their white counterparts work in close concert.

It is a class struggle, the Panthers contend, not a racial one. However, many blacks still resent any alliances with whites.

When the Black Panther party was formed it was based on a 10-point program that largely called for broad social reforms. It demanded the right of self-determination, full employment and decent housing for blacks. It also demanded an end to police brutality, justice in the courts, adequate education, military exemptions and freedom for all imprisoned blacks.

Much of what they asked had been asked before. The difference was in the approach. The Panthers would neither picket nor demonstrate. Instead they urged blacks to organize and force change. And with it they took up the motto: Change, change by any means necessary.

APPENDIX C

STATE SHIELD LAWS

ALABAMA

Code of Alabama, recompiled 1958, Title 7, Section 370: Newspaper, radio, and television employees.--No person engaged in, connected with, or employed on any newspaper (or radio broadcasting station or television station) while engaged in a news gathering capacity shall be compelled to disclose, in any legal proceeding or trial, before any court or before a grand jury of any court, or before the presiding officer of any tribunal or his agent or agents, or before any committee of the legislature, or elsewhere, the source of any information procured or obtained by him and published in the newspaper (or broadcast by any broadcasting station or televised by any television station) on which he is engaged, connected with or employed.

ALASKA

Chapter 115, Laws 1967, Section 09.25.150. Claiming of Privilege by Public Official or Reporter. Except as provided in Sections 150-220 of this chapter, no public official or reporter shall be compelled to disclose the source of information procured or obtained by him while acting in the course of his duties as a public official or reporter.

Section 09.25.160. Challenge of Privilege. (a) When a public official or reporter claims the privilege in a cause being heard before the supreme court or a superior court of this state, a person who has the right to question him in that proceeding, or the court on its own motion, may challenge the claim of privilege. The court shall make or cause to be made whatever inquiry the court thinks necessary to a determination of the issue. The inquiry may be made instanter by way of questions put to the witness claiming the privilege and a decision then rendered, or the court may require the presence of other witnesses or documentary showing or may order a special hearing for the determination of the issue of privilege.

(b) The court may deny the privilege and may order the public official or the reporter to testify, imposing whatever limits upon the testimony and upon the right of cross-examination of the witness as may be in the public interest or in the interest of a fair trial, if it finds the withholding of the testimony would

(1) result in a miscarriage of justice or the denial of a fair trial to those who challenge the privilege; or

(2) be contrary to the public interest.

ARIZONA

Arizona Revised Statutes, Annotated (pocket part, 1965) Title 12, Section 2237: Reporter and informant.--A person engaged in newspaper, radio, television, or reportorial work, or connected with or employed by a newspaper, radio, or television station, shall not be compelled to testify or disclose in a legal proceeding or trial of any proceeding whatever, or before any jury, inquisitorial body or commission, or before a committee of the legislature, or elsewhere, the source of information procured or obtained by him and published in a newspaper or for broadcasting over a radio or television station with which he was associated or by which he is employed.

ARKANSAS

Arkansas Statutes 1947 Annotated (1964 replacement vol.) Title 43, Section 917: Newspaper or radio privileges.--Before any editor, reporter, or other writer for any newspaper, or periodical, or radio station, or publisher of any newspaper or periodical or manager or owner of any radio station, shall be required to disclose to any grand jury or to any other authority, the source of information used as the basis for any article he may have written, published or broadcast, it must be shown that such article was written, published or broadcast in bad faith, with malice, and not in the interest of the public welfare.

CALIFORNIA

West's California Codes, Annotated (Civ. Proc.) (packet pt., 1965) Section 1881(6): Newsmen.--A publisher, editor, reporter, or other person, connected with or employed upon a newspaper, or by a press association or wire service, cannot be adjudged in contempt by a court, the legislature, or any administrative body, for refusing to disclose the source of any information procured for publication and published in a newspaper. Nor can a radio or television news reporter or other person connected with or employed by a radio or television station be so adjudged in contempt for refusing to disclose the source of any information procured for and used for news or news commentary purposes on radio or television.

INDIANA

Burns' Indiana Statutes, Annotated, 1933, replacement volume 1946 (Supp., 1965 Title 2, Section 1733: Newspapers, television and radio stations, press associations, employees and representatives--Immunity.--Any person connected with a weekly, semi-weekly, triweekly, or daily newspaper that conforms to postal regulations, which shall have been published for 5 consecutive years in the same city or town and which has a paid circulation of 2 percent of the population of the county in which it is published, or a recognized press association, as a bona fide owner, editorial or reportorial employee, who receives his or her principal

income from legitimate gathering, writing, editing, and interpretation of news, and any person connected with a commercially licensed radio or television station as owner, official, or as an editorial or reportorial employee who receives his or her principal income from legitimate gathering, writing, editing, interpreting, announcing or broadcasting of news, shall not be compelled to disclose in any legal proceeding or elsewhere the source of any information procured or obtained in the course of his employment or representation of such newspaper, press association, radio station, or television station, whether published or not published in the newspaper or by the press association or broadcast or not broadcast by the radio station or television station by which he is employed.

KENTUCKY

Kentucky Revised Statutes (1963) Section 421.100 [1649d-1]: Newspaper, radio, or television broadcasting station personnel need not disclose source of information.--No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the General Assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected.

LOUISIANA

Code of Civil Procedure, Section 1. Definitions.--"Reporter" shall mean any person regularly engaged in the business of collecting, writing or editing news for publication through a news media. The term reporter shall include all persons who were previously connected with any news media as aforesaid as to the information obtained while so connected.

"News Media" shall include (a) any newspaper or other periodical issued at regular intervals and having a paid general circulation; (b) Press Associations; (c) Wire Service; (d) Radio; (e) Television; and (f) Persons or corporations engaged in the making of newsreels or other motion picture news for public showing.

Section 2. No reporter should be compelled to disclose in any administrative, judicial or legislative proceedings or anywhere else the identity of any informant or any source of information obtained by him from another person while acting as a reporter.

Section 3. In any case where the reporter claims the privilege conferred by this Act, the persons or parties seeking the information may apply to the district court of the parish in which the reporter resides for an order to revoke the privilege. In the event the reporter does not reside within the state, the application shall be made to the district court of the parish where the hearing, action or proceeding in which the

information is sought is pending. The application for such an order shall set forth in writing the reason why the disclosure is essential to the protection of the public interest and service of such application shall be made upon the reporter. The order shall be granted only when the court, after hearing the parties, shall find that the disclosure is essential to the public interest. Any such order shall be appealable under Article 2083 of the Louisiana Code of Civil Procedure. In case of such appeal, the privilege set forth in Section 2 herein shall remain in full force and effect during pendency of such appeal.

MARYLAND

Maryland Annotated Code (1957, 1965 replacement volume) Article 35, Section 2: Employees on newspapers or for radio or television stations cannot be compelled to disclose source of news or information.--No person engaged in, connected with, or employed on, a newspaper or journal or for any radio or television station shall be compelled to disclose, in any legal proceeding or trial or before any committee of the legislature, or elsewhere the source of any news or information procured or obtained by him for and published in the newspaper or disseminated by the radio or television station on and in which he is engaged, connected with, or employed.

MICHIGAN

Michigan Statutes, annotated (1954) Title 28, Section 945(1): Same: confidential and privileged communications. Section 5a.--In any inquiry authorized by this act communications between reporters (of) newspapers or other publications and their informants (are hereby declared to be privileged and confidential. Any communications) between attorneys and their clients, between clergymen and (the) members of their respective churches, and between physicians and their patients (are hereby declared to be privileged and confidential when such communications were necessary to enable such attorneys, clergymen, or physicians to serve as such attorney, clergymen, or physician.)

MONTANA

Revised Codes of Montana (1957, replacement, Vol. 7, 1964) Title 93, Chapter 601.2: Disclosure of source of information--when not required. No persons engaged in the work of, or connected with or employed by any newspaper or any press association, or any radio broadcasting station, or any television station for the purpose of gathering, procuring, compiling, editing, disseminating, publishing, broadcasting or televising news shall be required to disclose the source of any information procured or obtained by such person in the course of this employment, in any legal proceeding, trial or investigation before any court, grand jury or petit jury, or any officer thereof, before the presiding officer of any tribunal, or his agent or agents, or before any commission, department, division or bureau of the State, or before any county or municipal body, officer or committee thereof.

NEVADA

Section 1. Chapter 48 of NRS is hereby amended by adding thereto a new section which shall read as follows:

No reporter or editorial employee of any newspaper, periodical, press association or radio or television station may be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation:

1. Before any court, grand jury, coroner's inquest, jury or any officer thereof.
2. Before the legislature or any committee thereof.
3. Before any department, agency or commission of the state.
4. Before any local governing body or committee thereof, or any officer of a local government.

Section 2. This act shall become effective upon passage and approval.

NEW JERSEY

New Jersey Statutes, annotated (1952, packet part, 1965) Sections 2A:84A-21, 2A:84A-29:

2A:84A-21. Newspaperman's privilege: Rule 27.--Subject to rule 37, a person engaged on, connected with, or employed by, a newspaper has a privilege to refuse to disclose the source, author, means, agency or person from or through whom any information published in such newspaper was procured, obtained, supplied, furnished, or delivered.

2A:84A-29. Waiver of privilege by contract or previous disclosure; limitations: Rule 37.--A person waives his right or privilege to refuse to disclose or to prevent another from disclosing a specified matter if he or any other person while the holder thereof has (a) contracted with anyone not to claim the right or privilege or, (b) without coercion and with knowledge of his right or privilege, made disclosure of any part of the privileged matter or consented to such a disclosure made by anyone.

A disclosure which is itself privileged or otherwise protected by the common law, statutes or rules of court of this State, or by lawful contract, shall not constitute a waiver under this section. The failure of a witness to claim a right or privilege with respect to one question shall not operate as a waiver with respect to any other question.

NEW MEXICO

Section 1. Privileged Communication--Reporters.--A. It is hereby declared to be the public policy of New Mexico that no reporter shall be required to disclose before any proceeding or by any authority the source of information procured by him in the course of his work unless disclosure be essential to prevent injustice. In granting or denying a testimonial

privilege under this act, the court shall have due regard to the nature of the proceeding, the merits of the claim or defense, the adequacy of the remedy otherwise available, the relevancy of the source, and the possibility of establishing by other means that which the source is offered as tending to prove. An order compelling disclosure shall be appealable, and subject to stay.

B. As used in this section:

(1) "reporter" means any person regularly engaged in the business of collecting, writing or editing news for publication through a news media, and includes any person who was a reporter at the time the information was obtained but is no longer acting as a reporter; and

(2) "news media" means any newspaper or other periodical issued at regular intervals and having a paid general circulation; a press association; a wire service; a radio station or a television station.

C. Any reporter may waive the privilege granted in this section.

NEW YORK

New York State Civil Rights Law Section 79-h. Special provisions relating to persons employed by, or connected with, news media.--Notwithstanding the provisions of any general or specific law to the contrary, no professional journalist or newscaster employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network, shall be adjudged in contempt by any court, the legislature or other body having contempt powers, for refusing or failing to disclose any news or the source of any such news coming into his possession in the course of gathering or obtaining news for publication or to be published in a newspaper, magazine, or for broadcast by a radio or television transmission station or network, by which he is professionally employed or otherwise associated in a news gathering capacity.

OHIO

Page's Ohio Revised Code, annotated (1954) Section 2739.12: Newspaper reporters not required to reveal source of information.--No person engaged in the work of, or connected with, or employed by any newspaper or any press association for the purpose of gathering, procuring, compiling, editing, disseminating, or publishing news shall be required to disclose the source of any information procured or obtained by such person in the course of his employment, in any legal proceeding, trial, or investigation before any court, grand jury, petit jury, or any officer thereof, before the presiding officer of any tribunal, or his agency, or before any commission, department, division, or bureau of this State, or before any county or municipal body, officer or committee thereof.

1965 supplement:

Section 2739.04: Revelation of news source by broadcasters.--No person engaged in the work of, or connected with, or employed by any

commercial radio broadcasting station, or any commercial television broadcasting station, or network of such stations, for the purpose of gathering, procuring, compiling, editing, disseminating, publishing or broadcasting news shall be required to disclose the source of any information procured or obtained by such person in the course of his employment, in any legal proceeding, trial, or investigation before any court, grand jury, petit jury, or any officer thereof, before the presiding officer of any tribunal, or his agent, or before any commission, department, division, or bureau of this State, or before any county or municipal body, officer or committee thereof.

Every commercial radio broadcasting station, and every commercial television broadcasting station shall maintain for a period of 6 months from the date of its broadcast thereof, a record of those statements of information the source of which was procured or obtained by persons employed by the station in gathering, procuring, compiling, editing, disseminating, publishing, or broadcasting news.

Record as used in this section shall include a tape, disc, script, or any other item or document which shall set forth the content of the statements which are required by this section to be recorded.

PENNSYLVANIA

Purdon's Pennsylvania Statutes, annotated (1958, packet part, 1965) Title 28, Section 330: Confidential communications to news reporters.--(a) No person, engaged on, connected with, or employed by any newspaper of general circulation as defined by the laws of this Commonwealth, or a press association or any radio or television station, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any court, grand jury, traverse or petit jury, or any officer thereof, before the general assembly or any committee thereof, before any commission, department, or Bureau of Commonwealth, or before any commission, county or municipal body, officer or committee thereof.

(b) The provisions of subsection (a) hereof in so far as they relate to radio or television stations shall not apply unless the radio or television stations maintains and keeps open for inspection, for a period of at least 1 year from the date of the actual broadcast or telecast, an exact recording, transcription, kinescopic film or certified written statement of the actual broadcast or telecast.

APPENDIX D

ATTORNEY GENERAL MITCHELL'S STATEMENT ABOUT SUBPOENAS TO NEWS MEDIA

Following is the text of a statement February 5, 1970, by Attorney General John Mitchell about subpoenas issued to members of news media:

I regret that recent actions by the Department of Justice involving subpoenas for members of the press and property of the press have been the subject of any misunderstanding and of any implication the Department of Justice is interfering in the traditional freedom and independence of the press.

It has been the policy of the department in the past to issue subpoenas in order to obtain information held by the press which might be of some aid in both criminal and civil investigations.

Prior to my taking office, these subpoenas had been served on, and complied with, by members of the press from various media and had covered pictorial and written information, both published and unpublished.

The department has always recognized the particular sensitivity of the press in this area especially with regard to confidential informants, and the special place occupied by the press under the Constitution.

Because of these considerations, the department has had in the past, and continues to have today, a policy of negotiating with the press prior to the issuance of any subpoenas. These negotiations have generally taken two forms: negotiations on the actual scope of the subpoena prior to its issuance; or a clear understanding prior to issuance of the subpoena that the government would meet with the press and would be willing to modify the scope of the subpoena.

The point of these negotiations is an attempt to balance the rights of the press with the rights of the grand jury making an investigation. Several subpoenas have been served and complied with this year under this policy of pre-subpoena negotiations.

For example, a broad subpoena was served on one news publication to obtain information about a grand jury investigation in Chicago because there was no time to have a detailed negotiation on the scope of the subpoena prior to its issuance. However, the news publication was

informed prior to the issuance of the subpoena that the department would modify its request. In subsequent negotiations, the request was substantially modified.

Several Washington area news media have been given broad subpoenas for information involving university disturbances. Prior to the issuance of the subpoenas, the media were informed that the department would be willing to modify its request. In subsequent negotiations, the request was substantially modified.

Unfortunately, in other instances, this policy was not followed, and the subpoenas were served without any prior negotiations. When this was brought to our attention, we promptly ordered our attorneys to enter into negotiations in an attempt to reach an acceptable compromise. It is my understanding that these negotiations are now proceeding satisfactorily, and that in some instances, the government has dropped some of its requests.

We realize the peculiar problems that subpoenas raise for the press. We also realized that we have an obligation to the courts to attempt to obtain information which may be of value in an investigation.

We are taking steps to insure that, in the future, no subpoenas will be issued to the press without a good faith attempt by the department to reach a compromise acceptable to both parties prior to the issuance of a subpoena.

I believe that this policy of caution, negotiation and compromise will continue to prove as workable in the future as it has in the past.

APPENDIX E

SUBPOENA GUIDELINES

Following are guidelines issued August 10, 1970, by Attorney General John Mitchell to the Department of Justice for subpoenas to the news media:

First: The Department of Justice recognizes that compulsory process in some circumstances may have a limiting effect on the exercise of First Amendment rights. In determining whether to request issuance of a subpoena to the press, the approach in every case must be to weigh the limiting effect against the public interest to be served in the fair administration of justice.

Second: The Department of Justice does not consider the press "an investigative arm of the government." Therefore, all reasonable attempts should be made to obtain information from nonpress sources before there is any consideration of subpoenaing the press.

Third: It is the policy of the department to insist that negotiations with the press be attempted in all cases in which a subpoena is contemplated. These negotiations should attempt to accommodate the interests of the grand jury with the interests of the news media. In these negotiations, where the nature of the investigation permits, the government should make clear what its needs are in a particular case as well as its willingness to respond to particular problems of the news media.

Fourth: If negotiations fail, no Justice Department official should request, or make any arrangements for, a subpoena to the press without the express authorization of the attorney general. If a subpoena is obtained under such circumstances without this authorization, the department will--as a matter of course--move to quash the subpoena without prejudice to its rights subsequently to request the subpoena upon the proper authorization.

Fifth: In requesting the attorney general's authorization for a subpoena, the following principles will apply:

A. There should be sufficient reason to believe that a crime has occurred, from disclosures by nonpress sources. The department does not approve of utilizing the press as a springboard for investigations.

B. There should be sufficient reason to believe that the information sought is essential to a successful investigation--particularly with reference to directly establishing guilt or innocence. The subpoena should not be used to obtain peripheral nonessential or speculative information.

C. The government should have unsuccessfully attempted to obtain the information from alternative nonpress sources.

D. Authorization for requests for subpoenas should normally be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information.

E. Great caution should be observed in requesting subpoena authorization by the attorney general for unpublished information or where an orthodox First Amendment defense is raised or where a serious claim of confidentiality is alleged.

F. Even subpoena authorization requests for publicly disclosed information should be treated with care because, for example, cameramen have recently been subjected to harassments on the ground that their photographs will become available to the government.

G. In any event, subpoenas should, wherever possible, be directed at material information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of unpublished material. They should give reasonable and timely notice of demand for documents.

These are general rules designed to cover the great majority of cases. It must always be remembered that emergencies and other unusual situations may develop where a subpoena request to the attorney general may be submitted which does not exactly conform to these guidelines.

APPENDIX F

U.S. DISTRICT COURT RULING IN EARL CALDWELL CASE, APRIL 3, 1970

Following are excerpts from the opinion issued April 3, 1970, by Federal Judge Alfonso J. Zirpoli on a motion by Earl Caldwell and The New York Times to quash a subpoena seeking testimony on interviews with Black Panther party members:

Reduced to their simplest terms the questions presented are:

1. Must Earl Caldwell appear before the grand jury in response to the subpoena issued March 16, 1970?

2. If he must appear, should the court issue a protective order limiting the interrogation of Caldwell?

The short answer to these questions is "yes" as to each question.

1. Caldwell must respond to the subpoena. It has long been settled "that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the government is bound to perform upon being properly summoned." Blair v. U.S., 250 U.S. 273, 281; U.S. v. Bryan, 339 U.S. 323,331.

2. On the facts of this case, he is entitled to a protective order. 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 indispensible 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.

Accordingly, it is the order of the court that Earl Caldwell shall respond to the subpoena and appear before the grand jury when directed to do so, but that he need not reveal confidential associations that impinge upon the effective exercise of his First Amendment right to gather news for

dissemination to the public through the press or other recognized media until such time as a compelling and overriding national interest which cannot alternatively be served has been established to the satisfaction of the court.

APPENDIX G

ORDER IN EARL CALDWELL CASE LIMITING POWER OF SUBPOENA

Excerpt from order of Federal Judge Alfonso J. Zirpoli on April 8, 1970, limiting the federal government's power of subpoena on New York Times Reporter Earl Caldwell:

It is hereby ordered:

1. That if and when Earl Caldwell is directed to appear before the grand jury pursuant to reveal confidential associations, sources or information received, developed or maintained by him as a professional journalist in the course of his efforts to gather news for dissemination to the press through the press or other news media.

2. That specifically, without limiting paragraph 1, Caldwell shall not be required to answer questions concerning statements made to him or information given to him by members of the Black Panther Party unless such statements or information were given to him for publication or public disclosure.

3. That to assure the effectuation of this order, Caldwell shall be permitted to consult with his counsel at any time he wishes during the course of his appearance before the grand jury.

4. That except to the extent set forth in paragraph 1-3, the motion to quash or modify the subpoena of March 16, 1970, is denied.

5. That the government will entertain a motion for modification of this order at any time upon a showing by the government of a compelling and overriding national interest in requiring Caldwell's testimony which cannot be reached by any alternative means; and that the court retains jurisdiction of this matter, for the purposes of entertaining such a motion by any party for the implementation or modification of this order; and

6. That this order and the return date of the subpoena of March 16, 1970, are stayed until April 26, 1970; and in the event that any party hereby files a notice of appeal of this order on or before April 26, 1970, then this order and the return date of the subpoena are further stayed until final disposition of the appeal, or until further order of this court.

APPENDIX H

COVER LETTER AND QUESTIONNAIRE USED IN STUDY

9-12-71

Dear

I am doing a master's thesis about the Earl Caldwell Case and confidential communications.

Enclosed is a questionnaire which I hope you will answer for me. A stamped return envelope also is enclosed.

I will appreciate having the questionnaire returned as soon as possible so I can meet fall semester deadlines.

Thank you.

Sincerely,

Twila Crawford
Kansas State University
Graduate Student

Enclosure

Twila Crawford
Rt. 4, High Meadow
Manhattan, Kansas
September 12, 1971

QUESTIONNAIRE

Please return to me as soon as possible.

Circle the appropriate answer, please. You may add additional thoughts on the back of these sheets or on additional pages.

1. Do you think there was harassment against the news media during 1970 by federal law enforcement officials?	Yes	No	No Opinion
2. In your opinion, did the federal government use the subpoena as an attempt to cut off the radical movement from the established news media?	Yes	No	No Opinion
3. Should the following be available to government authorities:			
---reporters' notes?	Yes	No	No Opinion
---unused pictures?	Yes	No	No Opinion
---television out-takes?	Yes	No	No Opinion
---complete files and records?	Yes	No	No Opinion
4. Should a newsman appear			
---before a secret grand jury when subpoenaed about his news information?	Yes	No	No Opinion
---before an open court when subpoenaed about his news information?	Yes	No	No Opinion
5. If a reporter has heard a confidential threat of crime, should he testify			
---before a secret grand jury?	Yes	No	No Opinion
---before an open court?	Yes	No	No Opinion
6. If a reporter witnesses a crime, should he testify			
---before a secret grand jury?	Yes	No	No Opinion
---before an open court?	Yes	No	No Opinion
7. Should a newsman have the same legal obligations as any citizen to testify in grand jury or court proceedings?	Yes	No	No Opinion
8. Should the journalist himself decide on the limitations of privileged communications?	Yes	No	No Opinion

Twila Crawford
Rt. 4, High Meadow
Manhattan, Kansas
September 12, 1971

9. Should there be a Supreme Court ruling defining privileged communications for newsmen? Yes No No Opinion

10. Should there be some type of shield law for newsmen? Yes No No Opinion
If yes,
a. should there be a federal shield law? Yes No No Opinion
b. should each state have its own shield law? Yes No No Opinion

11. Would you expand on any feelings you might have about journalists and confidentiality of news sources?

NAME (optional)

POSITION

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SELECTED BIBLIOGRAPHY

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THE NEWSMAN AND CONFIDENTIAL SOURCES: A FOCUS ON THE EARL CALDWELL CASE

by

TWILA JEAN CRAWFORD

B. A., Kansas State University, 1967

AN ABSTRACT OF A MASTER'S THESIS

submitted in partial fulfillment of the

requirements for the degree

MASTER OF SCIENCE

Department of Journalism and Mass Communications

KANSAS STATE UNIVERSITY
Manhattan, Kansas

1971

The objectives of this study were to (1) summarize the historical aspect of confidential sources and information; (2) discuss arguments concerning confidential communications and newsmen's privileges; (3) discuss the special problems of 1970 concerning the government's issuance of subpoenas to news organizations and officials who were reporting about radicals; (4) document the Earl Caldwell court case from its origin to the Ninth U.S. Court of Appeals decision; (5) survey news personnel with national media and attorneys who were involved in events of 1970 pertinent to this study and determine if there are differences of opinion between the professions concerning confidential communications.

Social and political turmoil set the scene for 1970 when numerous government subpoenas were issued to news media to obtain information about radical groups. New York Times Reporter Earl Caldwell became a central figure of the controversy between the press and government with his refusal to appear before a federal grand jury investigating the Black Panther Party, a militant revolutionary organization.

The newsman who is subpoenaed often is caught between his professional code of ethics which prohibits him from revealing confidential sources and information and his duty as a citizen to testify before a grand jury or court. Caldwell was confronted with the conflicts of testifying and turned to the First Amendment for protection against government subpoenas.

A United States court of appeals ruled in Caldwell's favor, stating that a reporter cannot be ordered to appear before a secret federal grand jury unless the government demonstrates a "compelling need" for his testimony. The government has an appeal of the ruling before the United

States Supreme Court which has never decided a case directly on the question of press subpoenas.

Journalists have no common law privilege to refuse to give the name of their sources of information. Seventeen states, however, have shield laws concerning newsmen's privilege. The need for uninhibited flow of news is the basic argument in favor of shield laws. But opponents contend that journalistic privilege would hinder the judicial branch of government in the administration of justice. Because of differing state statutes and contradictory court decisions, the idea of a federal newsmen's privilege act seems to be gaining support among newsmen.

In the survey in this study, thirty persons--15 journalists and 15 attorneys--were selected to receive a questionnaire. Six news media personnel and five attorneys responded to the questionnaire. Both journalists and attorneys believed (1) there was harassment against the news media during 1970 by federal law enforcement officials; (2) reporters' notes, unused pictures, television out-takes, and complete records and files should not be available to government authorities; (3) newsmen should not have the same legal obligations as any citizen to testify in grand jury or court proceedings; (4) there should be a Supreme Court ruling defining privileged communications; and (5) there should be a federal shield law.