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In the

# Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

vs. No. 70-57

EARL CALDWELL,

Respondent.



Washington, D. C.
February 22, 1972

Pages 1 thru 42



HOOVER REPORTING COMPANY, INC.
*Official Reporters*
Washington, D. C.
546-6666

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Petitioner,

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EARL CALDWELL,

Respondent.

Washington, D. C.,

Tuesday, February 22, 1972.

The above-entitled matter came on for argument at 2:07 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ERWIN N. GRISWOLD, ESQ., Solicitor General of the United States, Department of Justice, Washington, D. C. 20530; for the Petitioner.

ANTHONY G. AMSTERDAM, ESQ., Stanford University Law School, Stanford, California 94305; for the Respondent.

# C O N T E N T S



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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 70-57, United States against Caldwell.

Mr. Solicitor General.

ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.,

ON BEHALF OF THE PETITIONER

MR. GRISWOLD: May it please the Court:

This case is here on a writ of certiorari to review a decision of the Ninth Circuit Court of Appeals. The question raised relates to the obligation of a newspaperman to appear before a grand jury.

The court below held that he need not even appear. We think that decision was wrong, and that it goes far beyond anything that can be found in the words of the First Amendment, and beyond anything that can fairly or properly be implied from that provision.

The case arises in this setting: In November 1969, David Hilliard, the chief of staff of the Black Panther Party, stated publicly in a speech, "We will kill Richard Nixon". This speech was televised live and rebroadcast over many stations.

As a result, Hilliard was indicted in December 1969, charged with making threats against the life of the President of the United States, contrary to Section 871 of Title 18 of the United States Code.

The threat was repeated in three subsequent issues of the weekly periodical called "The Black Panther". Numerous public statements of a similar nature were reported as being made during the same period by members or friends of the Black Panther Party in various parts of the country.

The respondent in this case, Mr. Caldwell, is a newspaperman employed by the New York Times. He wrote a series of articles about the Black Panther Party, three of which appear in the printed record.

One of these was published in the New York Times on December 14th, 1969. It appears in full at pages 11 to 16 of the Appendix.

In this article the respondent reported on a conversation he had with Hilliard and others at the Panther's headquarters in Berkeley, California. He quoted Hilliard as making the following statement, and this appears on page 13 of the record:

"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."

And then Mr. Caldwell went on to say, in the article: "In their role as the vanguard in a revolutionary struggle, the Panthers have picked up guns."

Some weeks after the publication of this article the first subpoena was issued to Mr. Caldwell, on January 30th, 1970. This was a subpoena duces tecum, it appears on page 20 of the Appendix, but it was not pressed and it is not now involved in this case.

The second subpoena was issued on March 13, 1970. It appears on page 21 of the Appendix. It is a subpoena to testify only.

Most of the proceedings in the District Court were taken with respect to it. But the grand jury, to which that subpoena was returnable, expired early in May 1970. A new grand jury was empaneled and a new subpoena, the third subpoena, was served on May 22nd, 1970. It's that subpoena which is involved here.

The decision of the District Court related to it, but by order of the District Court, the proceedings relating to the earlier subpoena were incorporated into these proceedings, and therefore we refer to one or the other interchangeably.

A motion was filed to quash the May 22nd subpoena. It appears on pages 98 and 99 of the Appendix. It states:

"The grounds of this motion are identical to the grounds of movants' Motion to Quash Grand Jury Subpoenas filed March 17, 1970."

And it was with respect to the earlier motion to quash that Mr. Amsterdam stated, and this is on page 36 of the

Appendix, right in the middle of the page: "The essential claim of the motion to quash is that Mr. Caldwell's very appearance before the grand jury, under the broad terms of these subpoenas, will irreparably breach and damage associations and means of freedom of speech and of the press protected by the First Amendment."

The District Court, Judge Zirpoli, in the Northern District of California denied the motion to quash and directed the respondent to appear, but subject to very specific conditions.

Now, the District Court's order of April 7th, which was where he made the determination, appears at pages 94 to 97 of the Appendix, and the corresponding order of June 4th appears at pages 104 and 5 of the Appendix.

The relevant portion of the order actually involved is on page 105, and it reads as follows:

"It is hereby ordered:

"That Earl Caldwell is directed to appear before the grand jury pursuant to the subpoena of May 22, 1970, and in so doing he shall not be required 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 public through the press or other news media.

"(2) That specifically, without limiting paragraph

(1), Mr. 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, Mr. Caldwell shall be permitted to consult with his counsel at any time he wishes during the course of his appearance before the grand jury."

Thus, the issue here is an exceedingly narrow one. The respondent has been granted protection against revealing confidential sources and confidential statements. The government did not appeal from that part of Judge Zirpoli's order, and this was partly because we did not think that it was appealable.

It is clear, however, that these limitations are in no way at issue here. The only issue here is that expressed in Mr. Amsterdam's words in the show-cause hearing before Judge Zirpoli, when he said -- and this appears on page 108 of the Appendix, in the transcript of the hearing before Judge Zirpoli; just below the middle of the page -- "The only cause which we have to show is that Mr. Caldwell has a constitutional right not to appear before the grand jury."

The Court of Appeals below sustained this contention in its entirety, and held that the respondent need not even

appear before the grand jury, despite the broad protection which has been afforded to him by the District Court's order.

Q Well, in a way, is it despite or is it in view of the broad protection that's been accorded already?

Since he's been given so much protection, and since that's not been appealed from and is not in issue here, then isn't the question that it may be the issue that in view of this broad protection what possible purpose would his appearance before the grand jury fulfill?

MR. GRISWOLD: I think that that is perhaps an appropriate interpretation of the decision of the Court of Appeals, and it is exemplified at page 125, in the opinion of the Court of Appeals:

"Appellant asserted in affidavit that there is nothing to which he could testify (beyond that which he has already made public and for which, therefore, his appearance is unnecessary)" -- and I question whether his appearance is unnecessary; just because it appears in an article, there's some difference between testimony under oath and a newspaper article -- "that is not protected by the District Court's order."

This is a rather definitive and positive statement, but I think its basis in the record is then and attenuated.

Q But the whole paragraph, though, goes to that point, does it not?

MR. GRISWOLD: Yes, but this particular statement can rest only on the affidavit of Earl Caldwell, which appears at pages 17 to 19 of the Appendix. This is an affidavit intended to be self-serving and without any exegesis, and of course without cross-examination; and the only passage in the affidavit which bears any relation to this is on page 18 of the Appendix, about two inches above the bottom of the page, where Mr. Caldwell said:

"Generally" -- and "generally" certainly leaves quite a lot of room for discussion -- "Generally, those matters which were made on a nonconfidential or 'for publication' basis have been published in articles I have written in The New York Times; conversely, any matters which I have not thus far disclosed in published articles would have been given to me based on the understanding that they were confidential and would not be published."

Well, in the first place, what that word "generally" covers, what the exceptions may be because obviously when you say "generally" you recognize that there are exceptions, does not in any way appear and is surely a legitimate subject of inquiry. But there are other aspects of the matter. Mr. Hilliard was quoted in the article written by the respondent. That certainly is no longer confidential. What were the circumstances in which it was said? Was it after an evening of drinks, when people were talking pretty freely and loosely?

Was it puffing or boasting as a means of attracting attention?

Could it have been said in jest?

The government and the grand jury are as much interested in establishing the innocence of Mr. Hilliard as in getting a further indictment against him.

This does not begin to cover the field of questions which an experienced examiner could direct to the respondent, within the limitations imposed by the District Court. But it is sufficient, it seems to me, to show that this key statement in the opinion of the court below has no adequate foundation in the record.

Q Mr. Solicitor General, what about -- what's this Court of Appeals referring to in that next sentence? I'm looking at 125.

"If this is true -- and the Government apparently has not believed it necessary to dispute it". That's the next sentence after what you read.

MR. GRISWOLD: I don't know what is meant by the "Government apparently has not believed it necessary to dispute it", because it has --

Q You're certainly disputing it now.

MR. GRISWOLD: -- disputed it consistently, all the way along. It disputed in counter-affidavits before Judge Zirpoli; it disputed it in the Court of Appeals; and it is trying to dispute it here.

Q Well, it certainly suggests that the Court of Appeals thought that the Government agreed with it, the appellant's assertion in the first sentence, doesn't it?

MR. GRISWOLD: Well, if the Court of Appeals believed that, it was against every effort made to disabuse it, if such a belief.

The government has accepted the restriction, as I believe it had to; I don't think it had any choice. Conceivably, we could have sought mandamus, to compel the judge to remove this restriction. That would have involved long delays, which, at that time, we were anxious to avoid, and we did not foresee the long delays which have occurred.

However, we thought that the Court of Appeals would decide the case the other way, and we could get on with the inquiry. We felt that the order, that the limitation was not appealable, and that in our judgment and discretion it was not wise to seek review of it by mandamus; but it by no means follows that we accepted it, thought it was correct, thought that it was warranted, or, indeed, that it completely foreclosed any possible inquiry of Mr. Caldwell before the grand jury.

I believe that the decision of the Court of Appeals that he need not even appear is unprecedented. I know of no other decision that has held that a newsman or any other person need not appear before a grand jury.

I had supposed that everyone in the country, except the President of the United States, was amenable to subpoena before a grand jury subject only to the privilege against self-incrimination after he got there, and to the control of the court as to specific questions that might be put to him, such control being exercised after he appeared and it was known what those questions were, and the reasons why he felt that he should not be required to answer them.

Q Where does the exception to the President of the United States come from?

MR. GRISWOLD: In separation of powers, I suppose, by historical derivation from the King. Simply a matter of common constitutional law.

Q Well, what if the President of the United States were an eyewitness a --

MR. GRISWOLD: I think, if --

Q -- Federal offense?

MR. GRISWOLD: -- my mind goes back that far, it's Livingston and Jefferson, and the President was held not amenable to suit; and I understand that he is commonly regarded as not amenable to process of the courts.

Q I don't think Jeremy Bentham would agree with you. Jeremy Bentham said the King had to appear; didn't he?

Q Well, John Marshall said that the President didn't have to appear, didn't he, at the trial of Aaron Burr,

for example?

MR. GRISWOLD: In the trial of Aaron Burr, he said he did not have to appear. And I repeat, I believe that's what Livingston and Jefferson decided. It's just one of those historical, mildly anomalous rules which one learns in school, and which I had supposed was --

Q I guess I didn't learn it, that's the reason I was asking.

[Laughter.]

MR. GRISWOLD: -- which I had supposed was unquestione

Q And which probably doesn't hurt anybody very much.

[Laughter.]

MR. GRISWOLD: And there was a case following the Civil War, if I recall, too, it was somebody against Johnson --

Q Yes.

MR. GRISWOLD: -- South Carolina against Johnson, could it be, in which it was held that President Johnson was not amenable to suit.

Though the question actually involved in this case is a relatively narrow one, there is a constant effort to treat the case on a broader basis in the numerous briefs which have been filed; but this Court is 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 would jeopardize confidential relationships and thereby have a chilling effect on the freedom of the press guaranteed by the First Amendment.

It's clear there's no privilege to newspapermen at common law. A number of States have adopted statutes granting the privilege to newspaper reporters, but there's never been a Federal statute to this effect, and bills which would grant it have never come out of committee.

Thus, the respondent's position must rest exclusively on constitutional grounds, namely, that the First Amendment protects not only the right to print and publish, without abridgement, but also provides a constitutionally protected right to have a wholly unconstrained road in gathering the news. There is no foundation for this in the language of the First Amendment, surely, in its historical background, or in prior decisions of this Court.

Nevertheless, whatever this Court may do about a reporter's privilege generally, it should not justify his refusal even to appear before a grand jury to testify only to matters concededly nonconfidential in nature.

Most of the material in this record, consisting largely of affidavits prepared by well-known newsmen, is not relevant to this issue, since, with few exceptions, they deal with the questions of confidential sources and confidential material. They were filed before Judge Zirpoli's opinion.

Nevertheless, the position that the reporter need not even appear to answer questions with respect to nonconfidential material is argued vigorously, one might even say extravagantly. Thus, counsel for the respondent, in his brief, says:

"To an extent never previously shown, this record documents the devastating effect that the compulsion of newsmen's testimony has upon freedom of the press."

Yet, as I have indicated,with only one exception the items relied on deal with confidential sources and confidential material, which are not involved here; and they are based solely on affidavits from newsmen which are, in their nature, self-serving, never subject to cross-examination.

These affidavits do show that there is a reaching out among journalists for a reporter's source privilege. But such a desire among newsmen has heretofore fallen short of establishing a constitutional right.

Since the briefs were filed in this case, we have a new source of information about this. I'm not sure just what its status is, but there has been made available within the past two weeks a study report of the Reporters' Committee on Freedom of the Press. This seems to be an ad hoc group, of which Mr. Fred P. Graham of the New York Times is listed as coordinator. And the work was done by a Professor Vince Blasie of the University of Michigan Law School.

It's clearly a thoughtful, thorough, and reasonably objective report, subject to the comment that the information summarized was obtained only from reporters and others connected with the communications media.

In addition, a portion of the report has just been published in the article in the Michigan Law Review for December 1971. This is the newsmen's privilege and empirical study in '70 Michigan Law Review 229. Perhaps it's just my academic background that makes me regret that Professor Blazie does not disclose in his Michigan article that his study was in fact commissioned by the Reporters' Committee.

As I have indicated, though, within the plan that he has adopted, he appears to have done a careful and thoughtful job, and the Court may find some useful materials in the study or in the article.

One thing that does appear, I think, is that reporters generally are much less intense about this than is the respondent's brief. Professor Blazie says, for example, that the average newsman in the population surveyed relies on regular confidential sources in 22.2 percent of his stories, and on first-time confidential sources in 12.2 percent of his stories.

Another item of possible interest appears. He asked his respondents: in the last 18 months has your coverage of any story been adversely affected by the possibility that you

might be subpoenaed?

Of the 887 newsmen who answered this question, 8 percent said yes, 10.9 percent said "I'm not sure", and 81.1 percent of them said no.

And again in the respondent's brief in this case a reporter, Anthony Ripley, is referred to and the statement is made that, quote: "Anthony Ripley was destroyed by being subjected to a subpoena."

That's on page 75 of the Respondent's brief.

But Professor Blazie says in his report, these incidents were personally very upsetting to Ripley, but they did not significantly interfere with his reporting career; he subsequently was able to do a superb investigative story on the shoot-out in Cleveland. Anthony Ripley's case is thus not as it is sometimes cited to be, referring to the brief in this case, an example of a subpoena causing an intolerable interference with news flow.

If there were a reporter's privilege not even to appear before a grand jury, found by this Court for the first time somewhere in the penumbra of the First Amendment, for it's surely not within its terms, how far is it to extend? To whom is it to be made available?

Surely it could not be limited to what might be called the established press, like the New York Times, nor can it be limited to daily newspapers or to newspapers; you would

have to apply it to radio and television reporting, it would also have to apply to the foreign language press, the underground press, the college press; it would have to apply to magazines and surely to pamphleteers. What about people who write books?

And there are beginning to be assertions that there is an academic privilege, a privilege by academic persons not to testify about activities in which they have been engaged, which bear some relation to their fields of interest and scholarship.

If a privilege not even to appear before a grand jury is established on the part of the established press, I find it difficult to see where the limit can fairly be drawn with respect to anyone who publishes in any form or speaks, whether in the classroom or on the platform or on the street corner or in Union Square. There may be safeguards which are appropriate in particular cases. This is not an issue in this case.

But to hold that any person has the privilege not even to appear before a grand jury, without a single question being asked, goes beyond anything that has yet been decided and seems to us to go too far.

The grand jury should not, in this case any more than in other cases, be required to predetermine and disclose the scope of its investigation as a condition to calling before it

a reporter who has undertaken to make public many statements, including allegedly direct quotations from a number of people.

The press plays a great role in this country, and rightly so. It has almost unlimited freedom to print what it pleases, without prior restraint, as this Court's decision last June in New York Times against the United States shows.

But as I read the opinions in that case, though a majority of the Court opposed prior restraint on the facts of that case, there was also a majority of the Court that seemed to say that the press can be held responsible through criminal sanctions when they are applicable for what it does decide to print.

Surely, such possible criminal sanctions or civil liabilities for malicious libel, which, as far as I know, has never been barred, malicious libel, must have a chilling effect on the press, to utilize that over-used phrase.

What this means is that the press, though having great freedom to print, likewise has many responsibilities of citizenship. Just as the press is responsible and can be held responsible for its actions, reporters are citizens and retain the responsibilities of citizenship, at the very least; whereas here protection has been given against disclosing confidential sources or confidential information, there is no basis for giving a privilege not even to appear before a grand jury.

Since the court below in effect established such a

privilege, its judgment should be reversed.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Mr. Amsterdam.

ORAL ARGUMENT OF ANTHONY G. AMSTERDAM, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. AMSTERDAM: Mr. Chief Justice, and may it please the Court:

If constitutional adjudication were a process of picking the general legal doctrine that fitted a case most closely and applying it mechanically to resolve a specific controversy, then the present case would involve an intractably difficult problem.

The government stands on a categorical imperative that the grand jury is entitled to every man's evidence. We would, I suppose, have to stand on a categorical imperative of equal abstraction on the other side, that government may not abridge the freedom of the press, and the Court would have to pick between the two.

Of course that is not the issue, that is not our position; but it is the government's position which stands, I think, rather woodenly on the proposition that whatever protection the First Amendment may give against specific questioning by a grand jury, the obligation of a witness to appear before the grand jury is so absolute, saving only perhaps the President

of the United States, that no situation, no conflict with any other right, however its strength, can qualify the grand jury's right to have every witness appear before it. This position --

Q I suppose the appearance would give the opportunity to, or the chance that the witness might change his mind or break down or be sweated out of his former position?

MR. AMSTERDAM: Well, that is certainly one of the dangers involved in his appearance, and one of the reasons why we think his nonappearance, in the particular and very narrow circumstances of this case, is not required.

We think the government's position --

Q What happens on Fifth Amendment cases? On Fifth Amendment cases you have to go, don't you?

MR. AMSTERDAM: Yes, but the Fifth Amendment privilege, Mr. Justice Marshall, is based on quite a different footing. The Fifth Amendment privilege is based on the notion that the evidence that one gives may result in harm by incrimination. Nothing that underlies the Fifth Amendment depends on the effect of testimony upon one's relations with other people.

Q Well, the harm might be much greater in the case of the Fifth Amendment situation than in the First, might it not? He might go to jail for 20 or 30 years.

MR. AMSTERDAM: I cannot conceive of any way in which his appearance before the grand jury would incur much harm

under the Fifth Amendment, let alone more than in this case to the First. The --

Q Well, what if the circumstances were such that he were part of the -- or at least close enough to some organized and rather desperate criminal group, that he might get shot on his way to the grand jury, as soon as it became known. Would you think that would afford an excuse for going?

MR. AMSTERDAM: No -- perhaps I misunderstand the question. I have no doubt that no one may be exempted from an appearance before a grand jury, nor indeed from answering questions, simply because of considerations for personal safety. But in terms of Mr. Justice Marshall's question as to why one may compel a witness to appear in front of the grand jury, without prejudice to the Fifth, and I think Your Honor's question with regard to what prejudice to the Fifth would be incurred; there is no prejudice to the Fifth.

When a question is asked, he claims it. If the government then overbears him in any way, as Mr. Justice Douglas suggested, and the evidence is sought to be used against him, we have, of course, self-incrimination in violation of the Constitution, and it simply can't be used.

The Fifth Amendment, in short, is protectable by the process of having him respond to particular questions. The First Amendment privilege, which I hope to develop on the basis of the record here, rests on a very different footing

altogether. It rests on the impact of the interrogative process on relations between the reporter and his sources, which are not protected in the way that the Fifth Amendment could adequately be protected before the grand jury.

The position, then, that --

Q Well, that doesn't reach the point I was trying to flush out, Mr. Amsterdam. Suppose a man had witnessed a gang slaying, to make it more concrete, and he is at least thought by the police to have been a witness, although they're not sure, and they serve a subpoena on him in the usual course, and he goes into the District Court and says: If I go to that grand jury, my friends will never believe that I didn't tell something, and I'll be shot.

Now, you have just said that considerations of personal safety would never be an excuse for staying away.

MR. AMSTERDAM: That's correct, Your Honor. And --

Q But considerations of being able to gather news at some future date should be an excuse?

MR. AMSTERDAM: Yes, Your Honor, I --

Q That's more important than his life, the reporter's life?

MR. AMSTERDAM: Nothing is more important than life, but one doesn't reason backward from the fact that deprivation of life may be involved, but that other rights can't be taken away by a process which jeopardizes specific constitutional

guarantees. Punishment in this case, we think, is, as the government has stated, whether or not Mr. Caldwell is required to appear.

I would answer Your Honor's question as to whether a witness was required to answer any specific question in the same way in which I answered the question whether he's obliged to appear. Fear for the safety of life would be no defense to refusal to answer a specific question. Fear for the safety of life would be no excuse for not appearing at all.

The government is drawing a distinction between appearing and answering specific questions. Surely, that distinction draws no sustenance from the fact that a grand jury witness is not permitted to refuse to appear because his life may be in jeopardy. He's also not permitted to refuse to answer questions because his life may be in jeopardy.

That is, I think, a totally different issue from the issue here. Where it's not the witness's right primarily that is at stake at all, but what is primarily involved is the impact of the process of subpoenaing witnesses who are newsmen, with the inevitable effect on the editorial decisions which are made -- which I'll come back to -- and also the process of gathering news upon the free flow of information to the public.

That, I think, poses a totally different problem than any question of personal safety of any one particular

witness.

The government states the grand jury's right to the testimony of every man in terms which I think bring to mind Justice Holmes' famous aphorism, that every right tends to declare itself absolute to its logical extreme; followed, of course, by the observation that in fact every right is not absolute to its logical extreme, but is limited by the neighborhood of other principles, which come to hold water, to hold their own against that right when a certain point is reached.

The question in this case, very simply, is whether the point has been reached at which the general right, which we do not contest at all, of a grand jury to have the testimony of every man, to have every man appear, is to be accommodated at all to concerns for the First Amendment.

We take a very different view from the government. We don't stand on the proposition that nothing that the grand jury does which affects the First Amendment may be permitted; we don't take the position that the First Amendment is an end to the grand jury. What we think is involved is the accommodation of two very, very important concerns.

The grand jury's investigative process on the one hand, and the reporter's investigative process on the other.

And we think that the Court of Appeals properly, again on the narrow facts of this case, struck the balance between those two, by saying that, although ordinarily any

witness must appear before a grand jury, that in the case of reporters, on the showing made on this record, the government may compel appearance only by making a foundation showing, which it has never made or attempted to make in this case.

Now, the government has presented this case in this Court, both in its brief and in the argument, by taking really two positions; but the one it most stands on is that even if Mr. Caldwell has a right as a journalist, protected by the First Amendment, not to answer specific questions, that nevertheless he must appear.

Then the government appears to take the position, although it was not argued separately this morning in detail, that in fact the journalist doesn't even have any protection against specific questions.

Now, it's that way of phrasing the matter that kind of requires me to argue my case backwards. I would like to start logically by demonstrating that, as the Court of Appeals found, and through the processes by which it found it, that a reporter does have some consitutional protection, that there is some First Amendment interest implicated in the subpoena-compelled testimony of newsmen, and that that First Amendment interest requires some accommodation with the grand jury process. And then I would like to proceed to discover what accommodation is required in this case.

But since my argument time is limited, and there are

two other cases that follow this one that will deal primarily with the question of whether the reporter has any First Amendment protection at all, I think I'd like to start with the same position that the government took in this case and assume the validity of Judge Zirpoli's order, and ask whether, if Judge Zirpoli's order is proper and if this Court would affirm it, Mr. Caldwell should be entirely excused from appearing.

Then, in what time I have left after that, I can come back, if I can, and deal with the question of the propriety of the order.

Now, in dealing with that question, I think it is very important to follow the course of litigation in this case, and the positions that the parties have taken in it.

The litigation began by the service of a subpoena on Mr. Caldwell, it had a duces tecum rider that made it very clear that he was to be questioned about the Black Panthers.

Mr. Caldwell filed an affidavit in support of a motion to quash that subpoena, which recited that, among other things, he had no unpublished, nonconfidential information about the Black Panthers.

I'll read the specific terms of that affidavit in one second, but the first thing I want to point out is that this affidavit was not filed at a latterly stage of this proceeding in an attempt to write himself into the protection of the district judge's order. This was filed at the very beginning,

before anybody had the faintest idea what the district judge's order was going to be.

And Mr. Caldwell -- the reason for the word "generally" at the beginning, I should note, of the quotation I'm going to read, which Dean Griswold has focused on, is to explain the immediately preceding sentences in which Mr. Caldwell makes clear that the way the Panthers function with the press doesn't involve an on-the-record/off-the-record type of a thing, it's an understanding of what is confidential and what is not.

It is in that context that he says "generally, those matters which were made on a nonconfidential or 'for publication' basis have been published in articles I have written in The New York Times."

Now we get to the converse proposition, which is the important one, and which is qualified by no "generally": "Conversely, any matters which I have not thus far disclosed in published articles would have been given to me based on the understanding that they were confidential and would not be published."

He's asserting quite categorically that he does not have unpublished nonconfidential material about the Black Panthers.

Now, the government put in numerous affidavits, made no contest on this point whatsoever. The District Court came down with an order granting Mr. Caldwell a protection against

specific questioning, but requiring him to go before the grand jury.

During the course of proceedings under that one, that grand jury expired; a new subpoena was issued; the government again had a full-blown chance to contest factually the proposition on which the Court of Appeals later was to make its finding that Mr. Caldwell had no unpublished nonconfidential information to give the grand jury. And the government made no such showing.

Q Mr. Amsterdam, isn't the place where the government ordinarily contests that is before the grand jury itself? That is, the government may not know what Caldwell will be able to testify to, and customarily it brings him before a grand jury to find out what his testimony would be.

MR. AMSTERDAM: I have no doubt that if there were no reason to give him protection against appearing before the grand jury, that a perfectly proper place to explore that question would be before the grand jury. But where the claim is made, as it was in this case, that there are serious constitutional implications, harms to the First Amendment, of his very appearance, then the court may properly inquire, I believe, whether there is anything that the government could get out of him if he went in front of the grand jury.

Q Isn't the government at a built-in disadvantage in that sort of a proceeding, in that the witness, such as Mr.

Caldwell here, will have his version of what the government could get out of him, supplied by affidavit, and the government not having had the advantage of examining, very likely he simply doesn't know what it may get out of him?

MR. AMSTERDAM: Well, that is precisely, we think, the implication of this Court's decisions, for example, in the legislative investigation area: that although government is at a disadvantage in starting investigations, it may not start them in a way that has the drastic effect on the First Amendment, simply on speculation.

I agree that in many cases it may be difficult for the government to know what a reporter knows. But, Mr. Justice Rehnquist, the government subpoenaed this man for a reason, I suppose; we think it's based in part on electronic eavesdropping, but the government says it subpoenaed him on the basis of his stories.

Now, if there were any evidence in the stories that he had nonconfidential unpublished information, or if the government would provide other information that we think it has about Mr. Caldwell's communications with the Panthers, there would be no difficulty at all in establishing what the government thinks that Mr. Caldwell knows.

The government hasn't even suggested, in this case, anything that may be nonconfidential that Mr. Caldwell has. There are many ways in which the government could go about

making such a showing: the face of his writings; anything that he had said outside of his writings, that the government may have overheard, in terms of his communications with the Panthers, something very much in issue in the background of this case.

Q Well, what about -- MR. Amsterdam, what about calling him to get him to put on the record what he has written in his stories?

The nonconfidential information that a grand jury may well want to hear in order to -- as a -- to get it in forum form, and in order to get its own reaction to it?

MR. AMSTERDAM: Mr. Justice White, I cannot deny and do not deny that it would be admissible evidence before a grand jury to have Mr. Caldwell come in and authenticate his story. I don't deny that.

Nor do I assert that what he published was confidential; his publication of it makes it very clear that it was not confidential.

What I do assert, and what I think the Court of Appeals very plainly believed, was that there are certain increments to investigation which are so de minimis, so marginal, so totally insignificant that any significant First Amendment harm on the other side plainly outweighs them; in the same way in which the State cannot, even though it has an interest in prohibiting street littering, it cannot forbid the giving out

of handbills.

Now, let's look for a moment at what Mr. Caldwell's authentication of this article would tell the grand jury.

Q Before you get to that, let me ask you this, because it may relate to it. Suppore the articles that were actually published showed concrete evidence of indictable offenses, do you think that the grand jury could just put those articles in the record of the grand jury and then indict on that basis, or do you think that they ought to have the duty to call him and make the same statements under oath?

MR. AMSTERDAM: Well, Your Honor, do I think that the grand jury could or properly should subpoena a reporter?

Q Yes.

MR. AMSTERDAM: I think that if the reporter's statement describes the elements of indictable offenses, that the authentication of the story would, in many but not all cases, provide valuable information for the grand jury.

Now, one of the tests we propose as a foundation for calling a report before the grand jury is that that information not be available through other means that are less disruptive of First Amendment interests; and so I'm notanswering Your Honor's question, suggesting that that witness, I think, could always be called.

But I will say it would be a totally different case than this case. Because here what we have is authentication,

if anything, of a proposition that David Hilliard said that the Black Panthers were a revolutionary group, and that this was serious.

Mr. Justice White, what that would add to the grand jury's information is charily described as zero.

Q Well, what are you pushing? That any time, any time a court would decide that he doesn't have -- that his authenticating his published story would not contribute much, you can't call him; but in a lot of other circumstances you could. Is that your suggested rule?

MR. AMSTERDAM: Mr. Justice White, that's in our approach very basically is that it's that kind of accommodating judgment is what the standoff, if you will, of the grand jury institution, embodied in the Fifth Amendment and the First Amendment, calls for.

Q Mr. Amsterdam, is there any other group that can tell a grand jury, "I can't be subpoenaed"?

MR. AMSTERDAM: I'm sorry, Mr. Justice Marshall; is there any other --?

Q Group of people in the United States who, when they get a grand jury subpoena, can say "I won't go."

MR. AMSTERDAM: Well, yes, Your Honor, there are a number of people.

Q Who?

MR. AMSTERDAM: Well, one case is, for example, the

Window Glass Workers case, which is cited in our brief. That it's not a matter of a group. If an individual --

Q But you're talking about a group. You said anybody who has the word "reporter" in his vocabulary is it. Or do you draw a line?

MR. AMSTERDAM: I would suppose that there were constitutional rules, and I think that the First Amendment might be one of them, which might very well preclude other people from being called before the grand jury than reporters. I think that, for example, if the grand jury called before it individuals who were members of the NAACP in Little Rock, that in particular circumstances, with a particular balancing test, this Court might very well find that the very appearance of those people before the grand jury was so distructive of First Amendment interests that they could not be called.

Q Well, I'm speaking about '72. In California, what group is there that has this privilege of not even going, I mean a lawyer can go to the grand jury and say what you want from me would violate the lawyer-client privilege, and I won't tell you. A doctor can say, and they have their privileges, clearly established.

MR. AMSTERDAM: Well --

Q But they go and raise that privilege. But your -- as I understand your point, they don't even have to go to the grand jury.

MR. AMSTERDAM: Well, let me -- to start with, that is not necessarily my point; that is not the basis --

Q But that's what you said.

MR. AMSTERDAM: It is not the basis on which the Court of Appeals decision rests. My point is that if the defendant, if the grand jury witness is so completely protected by the protective order that he needs answer no questions which could be of any use to the government, that it would be a futile exercise to make him appear, and that that would violate the First Amendment if the fact of his appearance would have a significant --

Q Well, may I ask, Mr. Amsterdam -- let's take this very protective order, but an article which has been published in the New York Times attributing to someone an omission that he had committed a murder. In that circumstance, with this very protective order, would that be a situation in which he would have to appear, where the balance would be that he must appear?

MR. AMSTERDAM: I think, with one qualification again, Your Honor, that I think the government should have to show also unavailability of equal information from another source. But if we put that one aside, and I'm willing to put it aside because I don't need to reach it for the purposes of this case, then I would say that the government could call him.

Q Well, then, all you're asking is, as I under-

stand it, a principle which requires the balance and which balance made in this case opts in favor of affirmance of the Court of Appeals?

MR. AMSTERDAM: Precisely.

Q That's all there is to it?

MR. AMSTERDAM: Precisely. Now, Your Honor, I think this is very important. Mr. Justice Marshall, the court below took this thing in two bites, and I'd like to take it in two bites if I can.

Bite one is the question whether or not this witness was entitled to some kind of protection against open-ended questioning before the grand jury, which might intrude on First Amendment relations.

Now, we argue that his open-ended appearance before the grand jury would have a devastating effect on the free flow of information thaz's central to the First Amendment.

Q Well, let's get to this point: Wouldn't it be -- you wouldn't raise the question, as I understand, that part of the opinion of the Court of Appeals said the government has a responsibility for showing what they need you for. Is that right?

MR. AMSTERDAM: Served upon the narrow facts in this case, that's correct. No question. But let me --

Q Well, what would happen, for example, if Mr. Caldwell was talking to members of the high-faluting fly people,

confidentially, et cetera, and he gets subpoenaed, and he says: "I don't have to come because whatever I heard was confidential" and the government says, "Yes, but while you were there they brought out two dead bodies" --

MR. AMSTERDAM: That would meet the government's burden.

Q And you'd have no problem with it?

MR. AMSTERDAM: No problem. And the Court of Appeals decision leaves that open, and the thing that has been, I think, totally ignored in the government's argument in this Court is that that is open.

Not only has the government, at every opportunity below, failed to claim that there were any dead bodies lurking around here, or any nonconfidential information; but the Court of Appeals sort of leaves it to the government to show that on remand. The Court of Appeals' only holding in this case is, it's a very narrow one, and this appears on page 125; it says that:

"If any competing public interest is ever to arise in a case such as this" -- that is any competing belief or the testimony of a witness -- "where First Amendment liberties are threatened by the mere appearance at a grand jury investigation, it will be on an occasion in which the witness, armed with his privilege, can still serve a useful purpose before the grand jury. Considering the scope of the privilege

embodied in the protective order, these occasions would seem to be unusual. It is not asking too much of the government to show that such an occasion is presented here."

We stand on that and think this Court plainly ought to affirm this, because it's plainly raised.

Q Well, then, in any event, you are not asking or suggesting that the First Amendment in this area requires a prophylactic rule, are you?

MR. AMSTERDAM: Absolutely not.

Q That the reporter need not even appear.

MR. AMSTERDAM: Absolutely not, Your Honor. We are seeking to sustain this decision on the ground below that the witness had a privilege, embodied in Judge Zirpoli's order, which would in fact have so totally deprived his appearance of meaning that the residual harm which would have been done to First Amendment right far outweighed the residual benefit that would have been done to the grand jury's investigative process.

Now, --

Q Is it possible that the Court of Appeals had no factual basis on which to reach that conclusion?

MR. AMSTERDAM: It is not possible that they had no factual basis on which to reach it, and they --

Q Well, I suppose you would be saying that it would not be possible for us to make that conclusion on this

record?

MR. AMSTERDAM: No. I think, first of all, with due deference to the Court of Appeals' conclusion, which stated not only that it reached it on the basis of the record, but that the government had not contested it, would not permit this Court to upset the ruling, but, besides, I think it would be inappropriate for the Court to upset it. Because the Court of Appeals' judgment allows the matter to be litigated by the government in District Court, where it can be far better litigated than by inferences such as what the word "generally" means on a cold record in this Court.

Now, my time is so close to running, that I would just like to spend a minute or two more on why I think the residual harm of mere appearance in this case does outweigh the residual benefit of mere, for example, authentication of the article.

The government is wrong in its assertion that only one, I think it said here, two in the brief, of the reporters below claiming that mere appearance would have a devastating effect on First Amendment rights.

In fact, there are six reporters who said this, the pages in the record cite it on page 53 of our brief in the footnote will give the Court those page references.

The government has also made some reference to Professor Blazie's study. There are several things that ought

to be said about Professor Blazie's study, not the least of which appears on page 69 of it, nothing in the opinion of every reporter with whom I discussed the matter would be more damaging to source relationships than a Supreme Court reversal of the Ninth Circuit Caldwell holding.

Several newsman told me that initially they were extremely worried by the subpoena scare of two years ago, but that now their anxieties have greatly subsided as a result of the strong stand taken by the journalism profession and its victories in court.

However, a Supreme Court declaration that the First Amendment is in no wise abridged by the practice of subpoenaing reporters would, these newsmen assert, set off a wave of anxiety among sources.

Q What are you reading from?

MR. AMSTERDAM: It is their opinion that a Supreme Court holding would --

Q Mr. Amsterdam, I have the Michigan Law Review version of it.

Q No, he's got the big thing.

Q Have you got the -- what page?

MR. AMSTERDAM: I have the full-scale study, and I believe that these are available, Your Honor.

Q I have that in my office. I just wondered if you had a cross page reference to this?

MR. AMSTERDAM: Page 69, in the footnote -- the footnotes are the same, it would be at footnote 215 and in that area.

Q Thank you.

MR. AMSTERDAM: The next point that I want to make about the Blazie Study, I think demonstrates the importance of not litigating the fact questions in this Court, but rather sticking to the record which I think is very clear on such questions as source reliance and chilling effect.

The government has mentioned the fact that 8 percent of reporters said in the last 18 months that it had not been affected by the subpoena controversy. But Blazie's study nowhere says when the reporters were asked that question and when they answered. In fact, the questionnaire went out in the third week of July 1971, and answers were tabulated until October 20th of 1971, 18 and one-half months after the Caldwell decision by the District Court.

The Caldwell decision by the District Court had been given very wide publicity, as giving newsmen a general protection if, as Professor Blazie says on page 68 of this document, it cleared the air. It's perfectly understandable that relatively few reporters would have been affected in the period of the 18 months following that decision by the fears, which it is the very purpose of this litigation to lay to rest.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Amsterdam.

Thank you, Mr. Solicitor General.

The case is submitted.

[Whereupon, at 3:07 o'clock, p.m., the case was submitted.]

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