In the

Supreme Court of the United States

In the Matter of:)
)
PAUL PAPPAS,)
) No. 70-94
Petitioner.)

Washington, D. C.
February 23, 1972

Pages 1 thru 68

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

IN THE SUPREME COURT OF THE UNITED STATES

- x

IN THE MATTER OF PAUL PAPPAS,

Petitioner. : No. 70-94

- x

Washington, D. C.,

Wednesday, February 23, 1972.

The above-entitled matter came on for argument at 1:00 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:

E. BARRETT PRETTYMAN, JR., ESQ., 815 Connecticut Avenue, N. W., Washington, D. C. 20006; for the Petitioner.

JOSEPH J. HURLEY, ESQ., First Assistant Attorney General of Massachusetts, 373 State House, Boston, Massachusetts 02133; for the Respondent Commonwealth of Massachusetts.

WILLIAM BRADFORD REYNOLDS, ESQ., Assistant to the Solicitor General, Department of Justice; for the United States as amicus curiae.

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 70-94, in the Matter of Paul Pappas.

Mr. Prettyman, you may proceed whenever you're ready.

ORAL ARGUMENT OF E. BARRETT PRETTYMAN, JR., ESQ.,
ON BEHALF OF THE PETITIONER

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

I represent the petitioner in this case, Paul Pappas. This is the third case in the trilogy now before the Court involving the First Amendment to newsmen.

The facts in the case are relatively simple. Mr. Pappas is an experienced, professional newsman-photographer for WTEV-TV, with its principal offices in New Bedford, Massachusetts.

The station covers all of Rhode Island, part of Massachusetts, part of Connecticut.

On July 30th, 1970, he was in Providence, Rhode Island, when he received a call from his station telling him to go to New Bedford. "They seem to be burning down New Bedford" was the message that he got. "They" were not identified.

He went to New Bedford, to the west end of the town where, apparently, these disorders had been described for him, and he there ran into a barricade. He therefore returned to the New Bedford office, after which he received another call

from his superiors telling him that if he went back to the area he would be allowed into the area through the barricade.

He returned and he set up his cameras outside a boarded-up variety store, which apparently was being used as headquarters for the Black Panthers.

He set up his camera, and a spokesman for the Panthers came out of the store, with about a dozen blacks; they gathered, and the spokesman gave a press interview. There were approximately five newsmen present, including Mr. Pappas.

All of the films which Mr. Pappas took of the news conference were subsequently given to and viewed by the district attorney.

The next sequence of facts which actually gave rise to this case were prompted by two occurrences. First, during the news conference, the spokesman said that the police would be allowed into the store if they had search warrants, if they conducted themselves in a gentlemanly manner, and if they were accompanied by the news media.

The second occurrence was that at a kind of side conference, after the spokesman had gotten through with his formal press conference, the Panthers complained to Mr. Pappas that the news media always covered the side of the police in circumstances such as these, and on this point Mr. Pappas said, Well, that's because the media are never allowed to show any other side.

Now, it was as a result of these two occurrences that the Panthers then agreed with Mr. Pappas that he would be allowed into their headquarters that evening, to spend the night if he wished, if he came back personally.

But there was a condition: If there was a raid, they said, he would be allowed to report and photograph anything that took place; on the other hand, if there was no raid, there was no raid, any -- as he put it, "Anything I saw or heard would be strictly in confidence."

Later that night, after he had been accompanied back to and into the headquarters, these conditions were reimposed, they were specifically stated again, and he again agreed to them. As a matter of fact, there was some adverse comment about whether he might not be a police stoolie, and he assured them, No, he was there as a representative of the press. The understanding was that if there was a police raid, he was free to cover it; if there was no police raid, he would keep whatever he saw or heard in confidence.

Q Suppose, right there, Mr. Prettyman, that an unexpected event took place then, not the police raid, but suppose some internal quarrel of the group resulted in one of them killing another in his sight, do you think that pledge of confidence would be protected?

MR. PRETTYMAN: I think the privilege would come into play. I think that in the subsequent hearing on whether

there were overriding public interest in the production of his testimony, it might well sway the court that he saw,during the period of confidentiality and privilege,an event which was so vital to the public interest that he should be required to testify anyway.

Q Well, let's reduce the crime now. Instead of a killing, it was just a serious injury. Same procedure?

MR. PRETTYMAN: This is precisely, Your Honor, why we suggest to you that there must be a balancing test, and this is one of the factors that undoubtedly a judge would take into consideration in determining where the balance lies in this particular case.

How serious was the event that he saw? Was there any other source for getting the information? What was the public interest in it? Did he in fact have the relevant information? And so forth.

These are the very factors that a court would consider in determining whether he should be made to testify.

Q Would you say the same result would obtain if, while there, he observed them packaging or processing heroin from the raw state to a street-sale state?

MR. PRETTYMAN: Precisely. So long as -- so long as he was there and this occurred during the period when the privilege was in effect.

Now, the period here, we must remember, went into

effect when he went into the headquarters, not beforehand. And up until the time that there was a police raid, all restrictions were off. If anything occurred inside there, then that was privileged. But the Court might well find, in the given circumstances, that the public interest overrode privilege, as it does in --

Q But what does that do to his credibility with these people? I suppose --.

MR. PRETTYMAN: Your Honor, I think that a relationship of confidentiality that can come into effect for any number of reasons. I can only say here that while he apparently so far as the record shows, did not have a long acquaintanceship with the people, there obviously was something about his demeanor and his seriousness at the time of the press conference, which made them believe that they could trust this man. They did not give the same privilege to the other five newsmen who were present.

Q Mr. Prettyman, I take it then that you say that the balancing goes on on an ad hoc basis in each particular case, on the specific facts of each case?

MR. PRETTYMAN: Yes, sir.

Q Without any general rules or standards.

MR. PRETTYMAN: The general rule that I would lay down Mr. Justice White, is that there is a privilege and that there is a presumption that the newsman is protected, and then and

only then can the government come in with its burden and attempt to carry it by showing the various elements which we have outlined in our brief.

Q Well, what would you require them to show? They say we need this evidence to prove a crime; the packaging of heroin or the making of bombs or a murder, or something like that.

MR. PRETTYMAN: Well, let me emphasize first of all that there's absolutely no evidence in this record of any crime occurring during these three hours. I want to make that clear, because this is not a criminal case.

Secondly, assuming that there was a crime, then I would say that they would have to show that the grand jury is investigating a specific crime. I would say they would show that he had, at least probable cause to believe that he had information relating to that crime.

No. 3, that there was no other available source for receiving, obtaining the same information.

And, finally, that there was, as this Court put it in Gibson, overriding interest on the part of the public in obtaining that information.

Q Well, on that latter point, just the necessity to make a criminal case wouldn't be automatically enough, would it?

MR. PRETTYMAN: No, sir. In my view it would not.

Q So you would have to distinguish between crimes.

MR. PRETTYMAN: I do. I confess that a rule could be fashioned that wouldn't. In my own view, I think, for example, take the Branzburg case, that it's more vital that the public know that a youngster can get a drink in that community far harder than he can get pot; he can get pot virtually by asking for it, and that he can't get a drink.

I think it's more important that the public know that than that those boys be prosecuted.

On the other hand, I can well see that in a murder case, a desperate crime situation, that the interest might lie otherwise.

Q But I suppose if you're going, really, to achieve your purpose of maintaining the flow of information, there must be some predictability involved in applying these rules you're suggesting. Now, I just wonder if the rules you suggested would allow any person who is worried about disclosure to predict whether a reporter's claim of privilege would be respected or not, in this particular case, on an ad hoc case-to-case balancing approach?

MR. PRETTYMAN: Your Honor, I think there's the same degree of predictability as there is in a prior restraint case. In a prior restraint case you do have your exceptions. But the fact is that in 99 percent of the cases there can be no prior restraint. And here, I would say that the predictability comes

because in 99 percent of the cases the privilege stands, and the prosecutors know that, and they're not going to issue these subpoenas --

Q So it would be just sort of an odds thing; I mean, it's much more likely than not that the privilege will be respected in the run-of-the-mill cases, let's say?

MR. PRETTYMAN: It has, even without the privilege, in many instances before, as was pointed out this morning.

Q Yes. Well, what's the situation without the constitutional privilege?

MR. PRETTYMAN: I am afraid, Your Honor, that if the privilege was stricken, we would --

Q Stricken? It hasn't existed yet, has it?

MR. PRETTYMAN: If it was not allowed.

Q It hasn't existed yet, has it?

MR. PRETTYMAN: -- we would have a more serious situation.

Q Mr. Prettyman, you say that one of your standards is that the grand jury must be investigating a specific crime. That sounds simple, but I think that, to me, it imposes some problems. Supposing you have a grand jury convened to, say, investigate an ambulance chasing ring with police participation, as they recently had in Chicago; or a widespread graft and corruption by an official. Now, I take it, at the outset of that investigation you can't say that there was probable

cause to indict any particular individual, you're not even sure a crime was committed. Would that come within your definition of a specific crime?

MR. PRETTYMAN: Your Honor, if you will look at the Caldwell subpoena you will see specific crimes set out that the grand jury was investigating.

On the other hand, if you would turn to our single appendix, on the first page, you will see that the subpoena orders Mr. Pappas to appear and "there to give such evidence as he knows relating to any matters which may be inquired of on behalf of the Commonwealth before said grand jury."

Now, the Massachusetts Supreme Judicial Court has said that Mr. Pappas carries a burden to show that the grand jury inquiry is improper or oppressive.

I would like anyone to tell me how we can show that this is improper or oppressive grand jury inquiry, when we don't even know what in the world they're investigating.

Q Well, what, then, is your answer to my question?

MR. PRETTYMAN: My answer is that while it's quite true that in many instances the grand jury will go from one crime to another or will go from suspicion to fact, that where you have a First Amendment privilege involved, a heavy duty involved in the prosecution in trammeling on that privilege, that there there is a duty to indicate the kind of situation that they're inquiring into.

As a matter of fact, if you don't do that, you are not even sure whether the privilege covers the precise situation that they're looking to.

Q Well, suppose --

MR. PRETTYMAN: For example, -- if I might just --

Q Go ahead.

MR. PRETTYMAN: -- if it turns out that what they were really investigating here was something that happened on June 8th, when these disorders apparently were going on, as opposed to July 30th, that would be an entirely different situation than if they were looking into something which they think happened during the three hours that he was present in the headquarters.

I think there's a duty and a burden upon them to come forward with an indication of what it is that they're investigating.

Q Well, supposing they do come forward and say that, We're investigating allegations of an ambulance chasing racket with police connivance and violations -- which could be violations of several State statutes, and say no more than that. Does that meet your test of a specific crime?

MR. PRETTYMAN: If they cited the statute that they said was violated, and gave a period of time and a place where it was supposed to have occurred, I would say yes, it would meet my definition.

I would like to point out here, just by way of example, that the Massachusetts Supreme Court took judicial notice of the fact that there was gunfire, but they never said when, where, by whom, and certainly didn't say that it had taken place during the three hours he was there.

And this is the kind of danger I think you run into if you don't have some specificity in regard to subpoenaing newsmen before a grand jury.

Q Mr. Prettyman, is that the normal subpoena in Massachusetts, in that general language?

MR. PRETTYMAN: It's my understanding that while sometimes they are more specific, that this is -- as a matter of fact it's on a form, Your Honor, because it has a --

Q Well, that's what I assumed it was.

MR. PRETTYMAN: Yes. It has, as you'll see it has a blank space: "said blank or the grand jury".

Q Well, what I was thinking was that under that, much like the question I asked in the first case, in Massachusetts everybody, including those with privileges, like attorney-client, physician-patient, everybody else, with that general subpoena, would have to go except the newsmen?

MR. PRETTYMAN: Your Honor, it was not argued below in this case that the man did not have to appear before the grand jury. I would point out to you, however, that if there was ever a case where his appearance would be a useless act,

it would be this one, for this reason --

Q Well, that's not my point. My point is, they might be wanting to question him about a homicide by automobile, which he happened to witness on his way to work.

MR. PRETTYMAN: But that would not have been received in confidence, Mr. Justice Marshall.

Q But I mean -- but if he was a newspaperman, he wouldn't go.

MR. PRETTYMAN: No, sir. I quite disagree. He would go, and he would be required to give testimony, like anyone else.

Q Well, suppose on this day he went there and told the people: Whatever you say I'll keep it in confidence. And the next day he witnessed a fatal automobile accident. And he gets this general subpoena. And he'll -- I understand your position to say he won't go?

MR. PRETTYMAN: No, no. I was raising the generality of the subpoena only in relation to the specific confidentiality that has been imposed upon him. What I say is that in view of the fact that once the confidentiality is imposed, you therefore run right smack into your First Amendment problem, that the ordinary duty of the Commonwealth is to simply order a -- to issue a general subpoena, must go by the boards because then, since you're entrenching on First Amendment rights, they have got to be more specific and carry more of a burden --

Q Well, why do they have to be more specific about this automobile accident with the reporter than with anybody else?

MR. PRETTYMAN: Because the judge is going to have to make a decision --

Q Why?

MR. PRETTYMAN: -- balancing the various interests as to --

Q Why? Because he's a reporter.

MR. PRETTYMAN: Because, Your Honor, he is obtaining information for the public --

Q No, no, no, no. No, no. This is a reporter who has confidential information, and in an entirely different situation he witnessed a crime.

MR. PRETTYMAN: Your Honor, I --

Q So merely because he's a reporter you have to give him some kind of a hearing.

MR. PRETTYMAN: I think you have to give him a hearing because --

Q Merely because he's a reporter.

MR. PRETTYMAN: Merely because he is part of the press, protected by the First Amendment, who has received information in order to get the dissemination of information to the public, and without this kind of showing --

Q Well, how does the grand jury know that he's got

this confidential information? In my case.

MR. PRETTYMAN: He asserts it in the same way that a grand jury doesn't know that a fellow is going to plead the Fifth until he pleads it.

Q Well, let's get our facts straight now. He got confidential information, and he witnessed a crime; two separate things. One was in Boston, and one was in Cambridge. And he gets a subpoena to come to the grand jury. And he says, Unh-hunh, solely because I'm a reporter, no go; you've got to tell me what you want.

MR. PRETTYMAN: Your Honor, if I understand your question correctly, what he saw was not protected by the privilege because he did not receive it in confidence --

Q That's right.

MR. PRETTYMAN: -- and he stands in the shoes of any other man. The problem arises only when, as a newsman, in an attempt to gather, edit, analyze, write, and disseminate the information to the public --

Q Well, he hasn't pleaded that yet.

MR. PRETTYMAN: Well, that --

Q So nobody even knows he's got it.

MR. PRETTYMAN: Well, the fact remains, Your Honor, --

Q Then he still -- he gets different treatment on that subpoena.

MR. PRETTYMAN: Yes, sir.

Q That's my problem.

MR. PRETTYMAN: Yes, he does, Your Honor. And I can only reiterate that the privilege comes into effect when he is obtaining information in confidentiality from sources which, but for the confidentiality, he would never receive the story and the public would never receive the story.

Let us take this particular case, for example. Let's assume there had been a police raid this night. The fact of the matter is that the police raid would never have been covered from the inside except for this agreement of confidentiality. The public would never have received the story about that police raid from anybody's viewpoint other than the police.

Now, it so happens that the Panthers wanted their side at least told for once, not in a prejudice sense but to have somebody not just take the word of the police as to what had happened. And, notice, they placed no restriction on him in regard to his reporting of the police raid: You are free to report it any way you want to, to photograph anything you want to.

Q But you still haven't answered my point. Let's be real specific. A newspaperman and I both see a crime, and I get a grand jury subpoena, the only thing I am obliged to do is to go, and the newspaperman doesn't have to go --

MR. PRETTYMAN: No, Your Honor, --

Q -- solely because he's a newspaperman.

MR. PRETTYMAN: Well, I can only --

Q Is that your position?

MR. PRETTYMAN: No, sir. Unless he received the information in confidence. And where, in the instance that you pose, you did not say that an element of confidence was imposed upon him.

Q Well, the newspaperman received information in confidence, which he never published any place.

MR. PRETTYMAN: All right. Now, there is a lot of information, Your Honor, which is used --

Q Well, I mean, does the fact that he has this information, or is it the fact that he's a newspaper reporter? That's my only point.

MR. PRETTYMAN: Can I draw this distinction for you? A reporter goes to a public press conference by the President of the United States. He is there like any other reporter, no confidentiality applies. He, like a reporter, is like everybody else except that he's reporting. The story goes out.

The next day the President calls the reporter in and he says, "I would like this off the record. But I'm not sure that you fully understood the point that I was trying to make, and I want to give you an in-depth look so that in your future reporting, even though you do not report what I say, that you will understand and have a depth of knowledge about this that will make your reporting to the public more meaningful."

And he therefore gives him the story.

Now, I say, without relevance to the Presidency, I say that the confidentiality having been imposed, that the only way a grand jury is going to get out of him what the President has told him is if it shows an overriding public need for that information.

Q Well, my point --

MR. PRETTYMAN: It's the element of confidentiality that --

Q I haven't asked for that in my case, I just want to talk to you about this crime.

MR. PRETTYMAN: Well, I'm sorry if I haven't satisfied you. I --

Q Well, my whole problem is this -- the procedure that you set up is something in addition to what we normally have in a judicial process. Normally, when you get a subpoena before a grand jury, you can move to quash; that's about all you can do. Or you don't go, and you go to jail. Right?

MR. PRETTYMAN: That's right.

Q But the newspaperman, according to you, doesn't have to move to quash.

MR. PRETTYMAN: Only if he has information which he received in confidence.

Perhaps we can -- perhaps I can satisfy you by analogizing with the Fifth Amendment. You and I both go before

the grand jury, but it so happens I'm implicated in the crime. Now, we both are obligated to testify, in the sense that we both saw the same thing. But the fact is that as soon as I plead my Fifth Amendment right, I can then have a court determine whether I am properly pleading it. And I come out --

Q But the Fifth Amendment --

MR. PRETTYMAN: -- of your category, and I am separate from you. I am distinct. Because the constitutional privilege

Q No, you aren't distinct in going into the grand jury room. We both go into the grand jury room.

MR. PRETTYMAN: Well, can I put the appearance before the grand jury to one side?

Q Good!

MR. PRETTYMAN: Because the problem is that I -- we did not argue this below, and while I do want to say that since the only information that the grand jury is apparently seeking is the information that he acquired during the three hours of confidentiality --

Q And you say that if they ask him about the crime, he would of course testify to it?

The crime that was apart from that.

MR. PRETTYMAN: Oh, yes.

Q He would testify to it?

MR. PRETTYMAN: Absolutely.

Q Well, that's what I didn't understand your

position to be.

MR. PRETTYMAN: Yes. I'm sorry I didn't make that clear.

Q Yes.

Q You don't really, in your case, Mr. Prettyman, have to take the position at all that he had a right not to appear. Now, I understand that you support the Caldwell holding and you want to make clear to us that you do. But the facts of your case don't require you to. If this were the only case here --

MR. PRETTYMAN: That's right. I think --

Q Because your man did appear.

MR. PRETTYMAN: Yes.

Q And he did answer questions as to his name and occupation and so on, and it was only when they got to this, to the interrogation about what had happened inside the headquarters, that he said, "I refuse to answer."

MR. PRETTYMAN: Right.

Q So your -- the facts of your case are considerably narrower, are they not?

MR. PRETTYMAN: That's correct. That's correct. I do think I'd be misleading you if I didn't make two points about it, though.

No. 1 is that it would be a totally useless act for him to appear, and I am not in favor of putting a man in the

grand jury room for a totally useless time.

Q But he did appear?

MR. PRETTYMAN: He did appear once; correct. The other point --

Q He did respond to the subpoena, as I understand it.

MR. PRETTYMAN: That is correct.

The other point is that, in view of what the Caldwell court said about the Black Panthers, that would be equally applicable here. That is, if he disappeared again into the grand jury room, it might be that a number of things could happen, including his personal safety, as he testified.

Q But he has done it once, --

MR. PRETTYMAN: He did do it.

Q -- so that's not part of -- a necessary part of your case.

MR. PRETTYMAN: He did do it once. Absolutely.

Q Mr. Prettyman, I'm not sure I track the analogy that you introduced about off-the-record background news conferences. Was it your position that if, let us say a Congressional Committee, to get away from a court for the moment, called this newspaper reporter and said, What did the President, or some other government official, say to you in this background conference; that he would have this same kind of a privilege not to disclose it?

MR. PRETTYMAN: Your Honor, when we get away from the grand jury, there may be other considerations applicable, and I'm not attempting today to set down a set of criteria for trials, sole trials, legislatures, and so forth.

Q Well, let's bring it back into the grand jury then.

MR. PRETTYMAN: But, yes, that's absolutely right. What happens, as we see it, is this: That when he's called before the grand jury and the questions begin about -- well, as in this case -- What did you see and hear during your three hours in the headquarters? Did you see ammunition?

Q Well, I'm trying to stay over on the analogy in the background press conference, because you seem, I thought, to rely on some analogy.

MR. PRETTYMAN: All right. Let's take the press conference.

Q And the grand jury says, What did the Secretary of State, or someone else, say to you in that background press conference?

MR. PRETTYMAN: Right. Right.

Q Privilege?

MR. PRETTYMAN: Of recognizing that there may be some distinctions between a Legislature and so forth, or are you now posing the grand jury?

Q No, the grand jury.

MR. PRETTYMAN: All right. The privilege applies. And then what happens is he refuses to answer the question, and he goes before the judge, if the prosecutor persists. My feeling is the prosecutor wouldn't have called him in the first place, or won't persist if the court rules the right way; but, in any event, he goes before the judge and the judge says, as he did in this case -- Pappas was asked questions, and he told the circumstances under which he was at the press conference; he told the circumstances of his specific agreement, how he went in, how he was made to promise again, and how he came out.

Then the judge, having satisfied himself that in fact a confidentiality was imposed upon him, that he is in fact a newsman, during the course of his employment; then I would say that the judge then turns to the government or the State and says, All right, if you persist, you now have the burden, because of the First Amendment situation, you now have the burden to prove various factors.

What are you investigating? What do you think he knows about it? Have you gone to everybody else to try to get the same information? What is really the overriding need for this information in this case?

Now, this is not unique, Your Honor, because this is going on right now down in the lower courts; it's happening. We have cases in our brief, Dohrn and Rios and a lot of others, where courts are doing this exact thing. The fellow will refuse

to answer the question, the court will take him in, and he'll say: I find under these circumstances that your interest is not sufficient, in view of the First Amendment privilege, and therefore the subpoena is quashed.

Q I'm afraid I'm confused now about that analogy to the background press conference being off the record. Perhaps I'm unduly influenced by what we all do, I read the newspapers. I thought the press had taken the position now that they would not accept background or off-the-record statements --

MR. PRETTYMAN: Oh.

Q -- under any circumstances.

MR. PRETTYMAN: No, sir; that was the Washington Post did that, and the New York Times issued a set of instructions by which they use a great deal of care and discretion as to the extent that they will accept backgrounders. But this is not true of newspapers in general, and even with the New York Times it's not completely true.

I think you will find confidences at every level, and particularly the governmental level and particularly in regard to minority and radical groups today, as Professor Blaisse's report well demonstrates, that the confidentiality plays an absolutely vital role in the gathering and dissemination of information; absolutely essential.

Now, Mr. Justice Marshall, you indicated that the

ordinary man would have to appear in circumstances as we've outlined. The American Law Institute Model Code of Evidence allows the following people not to appear: There is, of course, self-incrimination; the attorney; the priest; the physician; the spouse; religious beliefs can't be inquired into; political votes; trade secrets; state secrets; official information; communication --

Q Well, don't they have to come and at least appear, Mr. Prettyman, and then assert the privilege?

MR. PRETTYMAN: Your Honor, I thought I put that to rest, in the sense that while I do believe that Mr. Pappas should not be made to appear, I have to concede that it was not argued below. You understand --

Q You're not saying here that these classes of people you're reading don't have to appear --

MR. PRETTYMAN: Oh, no.

Q -- you're saying they may not have to testify?

MR. PRETTYMAN: No. The argument has been made by Massachusetts, and perhaps suggested by the Justice, that the ordinary person has to turn up and testify, and that we're carving out of that, out of this inviolate right of the grand jury some special case for newsmen. But all I'm saying is --

Q But none of that list has a constitutional privilege?

MR. PRETTYMAN: Correct. That's absolutely correct.

Q And a good many of them have been established in other forums?

MR. PRETTYMAN: Some at common law, some by statute; that's correct. In Massachusetts, there is a list, which I won't read, but which is quite similar to the one I've just read. For example, a physician doesn't have a privilege, but a psychotherapist does. I mean there are all kinds of exceptions that people have right now.

So the only point I'm making on this, that it isn't as if we are saying the newsman is the only one out of the population who doesn't have to turn up to testify.

Q But the physician has to testify to a crime he saw committed?

MR. PRETTYMAN: I'm sorry, I didn't hear you.

Q A physician would have to testify as to the crime he saw committed?

MR. PRETTYMAN: Well, I think it depends upon his relationship with the party who was injured --

Q Well, a crime committed by two strangers to him.

MR. PRETTYMAN: Yes, I would say he would.

Q He would have to testify to that?

MR. PRETTYMAN: That's correct. And that is the point --

Q It's not the ordinary person, it's everybody except the President of the United States and the reporter.

MR. PRETTYMAN: But, Mr. Justice --

[Laughter.]

Q Right?

MR. PRETTYMAN: But, Mr. Justice Marshall, the distinction between the physician is precisely the one I was trying to make a few minutes ago.

Q I agree with you.

Q But, my brother Stewart, I don't see why you keep arguing that point; it's your case.

MR. PRETTYMAN: I wonder if I can get to the point that Mr. Justice Stewart made in the Branzburg case about speech versus the press.

Mr. Justice, I think if these were essentially the same interests, if they were equally protected, there would be no need for any reference in the press -- in the Constitution to the press, as such. The press privilege would be covered by the speech privilege.

I think that the speech privilege is not as broad as the functioning process by which the press operates.

To put it another way: that the press right is more than a right to speak. The mere right to speak without being able to obtain information, for example, would be a meaningless one.

Speech normally involves an individual or a group attempting to express an individual view. The press covers

the entire spectrum of dissemination, not only the views of news people and individuals but the gathering and analyzing and publishing of the whole raft of news that gets before the public.

I think that our Founding Fathers recognized that it's one thing just to speak out, but that it's also vitally important to get the widest possible range of information before the public, and the way to do it is through a free and untrammeled press.

Q My question didn't suggest that they were equivalent rights, but only that they were equally protected.

MR. PRETTYMAN: Well. I think that there are situations where they may well not be equally protected. There, I could envision a statute that's passed --

Q Well, I don't think you mean that. They are equally protected, but you say they're not equivalent rights, one's a broader right than the other.

MR. PRETTYMAN: Perhaps that's a better way of putting it.

Q Yes.

Q Well, since you distinguish them, then, where would you put television speech or press?

MR. PRETTYMAN: Well, I think television is equally covered with -- certainly encompassed within the press function. The Court has recognized that radio is. The lower courts have

recognized that television is.

As a matter of fact, if anything, there should be more of a right rather than a lesser one, because the figures show that, as compared with the largest daily newspaper circulation of some two million, CBS daily news in the evening has nine million viewers. So that the impact is far greater on news dissemination in television than even the press. I think it's clearly covered within the privileges.

I would like to get back, if I might, to the --

Q Mr. Prettyman, you would apply the same privilege, I take it, to the trial?

MR. PRETTYMAN: Your Honor, the point I made a little while ago was that when we get to trials, and we recognize that all three of these cases are grand juries, we have the element of secrecy, we have the element of merely trying to determine whether someone should be indicted, and so forth. There might be slightly different considerations that the trier of fact takes into consideration in balancing in a trial.

Q But the same rule would apply?

MR. PRETTYMAN: But privilege would apply. It would come into effect. And the only way the difference would be -- the trial compared with the grand jury would be as to whether it might be more important in a particular trial to have his testimony than in the grand jury room. Otherwise, I think they'd both be the same, yes.

Q I've already questioned your arguing somebody else's case, and now I've got to ask it. You refer to the Caldwell case. In a trial, the rationale for the Ninth Circuit decision in Caldwell just wouldn't exist, would it?

MR. PRETTYMAN: In terms of his appearance before the grand jury, that's correct.

Q Because he'd be appearing in a room open to the public --

MR. PRETTYMAN: Correct.

Q -- and everybody would know whether or not he had spilled the beans.

MR. PRETTYMAN: Absolutely, yes.

You recognize that even under the District Court order in Caldwell, this case has to be reversed. The State did not put on a single witness; it gave no testimony; it offered nothing in any way at the hearing. The only witness was Mr. Pappas, to establish the confidence.

The State not only carried no burden, but Massachusett said it did not have to, that there was no right to be recognized, and consequently the State carried no burden. And it said that if we want to prove that the grand jury was oppressive in some fashion, we would have to do that; but, again, since we are totally at a loss to know what it is that they want and why, it's impossible for us, obviously, at this stage to prove that this grand jury inquiry is oppressive.

There's not a word -- not a word -- of testimony or evidence from the State to prove anything here. All we have is the simple subpoena, in the general language that I've indicated to you. And in this regard, I'd like to relate -- take just a moment to relate an incident that I guess sustains this argument, because to me it drives home the importance of what we're talking to here.

Eugene Patterson of the Atlantic Constitution told of an instance where his paper did an exposé on narcotics in the Georgia State Prison System. They got the information from a doctor, who had worked there, and who insisted, for obvious reasons, that his information be kept confidential.

The paper published the exposé, and immediately a grand jury was called. The grand jury wasn't investigating the narcotics in the Georgia Price System; the grand jury wanted to know the doctor's name.

And the publisher refused to produce the doctor's name. And at the last minute, so as to keep him from going to jail, the doctor revealed his own name, and the grand jury was dismissed.

Now, that is the kind of thing that we face here if you allow, if you allow grand juries, without any sanctions at all, any control, any burden on the government, simply to subpoena someone at will who has received confidential information as part of the press, part of the duty to dissemin-

ate news to the public.

I am not for a moment condemning grand juries in general, or prosecutors in general, I am saying that there are too many instances of abuse in the past, and potential abuse for the future, where a newsman can be called as retaliation for a particular story; as a warning not to go to the Black Panther headquarters next time; for political reasons, or for anything else.

Q Well, Mr. Prettyman, would the -- in your view of the privilege, would it ever expire?

Let's assume the reporter said, I have no more news to report about this particular group or activity; my relationship with the group is over; I don't ever expect to get any more news out of that particular situation.

MR. PRETTYMAN: I think --

Q But there is -- but I do have an area of unpublished news that I promised not to reveal.

MR. PRETTYMAN: Well, in the first place, I think that the ability to waive is on the newsman, so that if he chose --

Q Oh, yes, he could -- but he chooses not to.

MR. PRETTYMAN: All right. If he chooses not to, I think the privilege extends --

Q Although he couldn't argue that by withholding this amount of news I'm going to get some more news out of them. He says, I never expect to get any more out of them.

MR. PRETTYMAN: Well, Your Honor, that's a large assumption, and I'm not sure you can make that. The point is, that having received something in confidence and then having, in effect, broken the confidence later, I think that that newsman's effectiveness could well be damaged.

Q Well, not only with that group but with others, you're saying?

MR. PRETTYMAN: Absolutely. In his whole ability to gather news, from whatever group.

Q Mr. Prettyman, going back to your prior statement about the, quote, "bad grand jury conduct" down in Georgia or some place. Do you suggest that the Court can engage in constitutional adjudication on a very important matter, on the basis that some grand juries sometimes abuse their powers?

MR. PRETTYMAN: I think that the Court can establish a rule that when a reporter, part of the press protected by the Constitution, receives, during the course of his news-gathering duties, information in confidence, that that brings the First Amendment into play, and he is protected --

Q But that doesn't get to my question. You seem to place great weight on the fact that one grand jury, that you recited, abused its powers, and I would assume it's true that some grand juries do. Is that a basis for constitutional adjudication?

MR. PRETTYMAN: Well, but, Your Honor, I think, in a

whole series of cases the Court has done precisely that. I think in Lamont, Bantam Books, Bates, Dombrowski, Talley, what the Court has done is not to say that in this particular instance there has been a suprression of a First Amendment right. I think what the Court has done in those cases is to say that if you are going to engage in the type of governmental interference involved in those cases, it is going to have a future chilling effect; and therefore I think it is incumbent upon the Court to look about, look not only to the instant case, but to look at the kind of abuse that could be inherent in a refusal to recognize the privilege.

I think certainly it can look to what is likely to happen if you do not establish the privilege here. You've got to remember, we're not trying to set a set rule here which a newsman can, for all time and under any circumstances, simply assert the privilege and go home. If he asserts it without warrant, if he asserts it in a situation he's not entitled to, that can be determined by the court, and that's the kind of adjudication that's constantly going on in all kinds of cases.

But, yes, I do think that in determining chilling effect, project for the future, that the Court can look at what might well go on. In a case, for example, where the State, you recall, attempted to make the pamphleteer's name and address appear on the pamphlet, the court didn't say that in that particular instance it would hurt the individual, it

said that that would deter people in the future from engaging in this kind of First Amendment exercise of rights.

Yes, I do think, absolutely, that you can look at the kinds of abuses that not only have occurred but might likely occur.

Q Mr. Prettyman, in the Georgia case which you mentioned, and about which the Chief Justice questioned you a moment ago, if it's demonstrable that the grand jury simply is not investigating any criminal activity or any legitimate act, might it not be that all persons including reporters would have a privilege against testifying in that situation? That that might not depend on a peculiar reportorial privilege.

MR. PRETTYMAN: If it was totally demonstrable that the grand jury was acting in an oppressive manner, it would fall even under the Massachusetts rule. But I'd like to point out, in that case, that it wasn't demonstrable until the grand jury, as soon as it got the doctor's name, dismissed -- was dismissed. It wasn't until it was all over, and until then, on the surface it apparently looked as if they were investigating narcotics.

But the first question was: Who told you that? And as soon as the name came forward, that was the end of the grand jury.

And how you would ever demonstrate that in advance, I don't know.

If I could save a few minutes for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Prettyman.

Mr. Hurley.

ORAL ARGUMENT OF JOSEPH J. HURLEY, ESQ.,

ON BEHALF OF THE RESPONDENT: MASSACHUSETTS

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

May I say at the outset that, in my view, there's no question here whether a newsman's confidences are going to be protected or not. The real question is: To what extent and how, by what means, and in what circumstances?

I do say, however, with respect to the contention that Mr. Pappas makes, that, as I understand his contention, a newsman, merely by virtue of being a newsman, as an indispensable part of his job, if you will, must be given the privilege not to give evidence that he has acquired about crime because he has acquired it, quote, "in confidence", unquote.

And that the reason for this privilege and the reason it rises to the constitutional level is that without this privilege there will be substantial interference, substantial impairment of the right of free press.

Now, the Commonwealth's position is, with respect, that this Court is not in a position to rule as Judge Zirpoli found in the District Court opinion in Caldwell, that it is indispensable that a newsman, all newsmen, under all conditions,

have this privilege, qualified though it may be; that it is essential to the operation of a free press that newsmen have this privilege.

I submit that unless this Court can rule that such a privilege is indispensable to the operation of a free press, this case does not rise to the constitutional level. And it then becomes a matter, at least so far as the State courts are concerned, for the States to determine whether and to what extent newsmen will be privileged, whether it's a qualified or an absolute privilege, not to disclose evidence of crime that they have obtained in confidence.

A matter, in other words, for legislation in the States, and, absent legislation, a matter for the same judicial protection afforded to any citizen against improper, oppressive, unreasonable inquiry, whether it be by a grand jury or whether it be on the witness stand in the course of a trial.

I think I should state a few additional facts of the Pappas situation, because some of the facts that my brother has given I think may alter my view of the legal problem involved here.

And particularly the point as to the terms and conditions under which Pappas entered the Black Panther headquarters on this night.

My brother stated, if I understood him correctly, that the agreement was that Pappas would be allowed into the

Black Panther headquarters with the understanding he would report nothing except a police raid, and that if there were a police raid all bets were off; and if my brother meant that it's his understanding that the agreement was that if there was a raid, ny question of confidence ended, I submit that's not what the record shows.

And I think this difference is important, for this reason: I say the record shows clearly that what Pappas agreed to do was to keep in confidence, not to report, anything he saw or heard inside that headquarters on that night, except a police raid.

In other words, what Pappas was agreeing to do is not the ordinary newsman-confidential source situation; what Pappas was agreeing to do was to silence himself as to Event A, namely, what might go on inside that headquarters other than in the course of a police raid, as the price of a possible story about Event B, the police raid.

What I'm merely saying is that if this Court should disagree and rule that it is indispensable to a free press that a reporter have such a privilege, then certainly the Court should rule that that privilege does not extend to a situation where a reporter seals his lips not for the purpose of getting information which he is going to use in one way or another as a reporter, but where he silences himself as the price of a story.

Because I submit the two are substantially different.

And the second situation, the situation that existed here is almost like the situation postulated by Mr. Justice Marshall: the reporter who sees a crime merely as a witness and not as a newsman.

Q This case, in other words, General Hurley, differs from the other two, in that, as you understand the record, Mr. Pappas promised not to write any newspaper stories or anything else, even changing identities and so on; just not to write any newspaper stories about what he saw there.

MR. HURLEY: He agreed to --

Q By contrast with the other two cases, where it was the publication of newspaper stories that triggered, apparently, the grand jury investigation. Right?

MR. HURLEY: That's right, Your Honor. He agreed --

Q And nothing was in fact ever written about this --

MR. HURLEY: Nothing was ever written.

Q -- what happened.

MR. HURLEY: There was no raid, he --

Q Anything from inside the headquarters.

MR. HURLEY: -- he never did write anything; that is true, Your Honor.

Q Would you analogize this tour that he was getting as a sort of visual backgrounder?

MR. HURLEY: Backgrounder. I would say no, Your Honor. I would draw a distinction. Suppose Pappas had been really writing about the Black Panthers, and, as my brother said, for all that the record knows, unlike Mr. Caldwell, Mr. Pappas is certainly not an expert on the Black Panthers. I don't say that to disparage him, but merely to point out a fact.

But let's suppose he were engaged in becoming an expert on the Black Panthers, and he said: Look, let me in, and let me find out what you people really do in there, and I won't report it; but it will be useful to me. I want to find out your side. I want to be able to report your side. Not specifically what goes on in here, but just to enrich my understanding of the Panthers, as background.

If he had done that, I would not be making the point I'm now making. But he didn't. And I think it's important to keep that in mind.

I would also like to develop, just somewhat more, the fact situation, because the suggestion has been made, not so much perhaps in my brother's oral argument as in his brief and reply brief, that there may be some suspicion here as to how seriously motivated this grand jury was, whether it was a fishing expedition, or possibly politically motivated.

I would like to point out to Your Honors that the record shows that in New Bedford, in July of 1970, and specifically on the 30th, on the 30th day of July, Pappas was brought

in from Providence because there were fires going on, and he, himself, was told by his own station, quote, "They seem to be burning the city down", unquote.

That doesn't mean that there was a rash of accidental fires, the only inference is there's something going on. Particularly when you couple that with -- and these are the words his own counsel used at the hearing in the Superior Court -- there was turmoil there; you went to report on the turmoil, the disturbances, the disorders. And Pappas said yes.

So he's obviously called in, not to report another great New Bedford fire, because there's something in the nature of, if you will, a riot, a civil disorder going on.

The barricades that are mentioned. My bother, at one point in his brief, wants the Court to infer that these may have been police lines. Well, obviously, the language of the street barricade is not that of the police line.

But I think we can infer from Pappas's own testimony in the Superior Court, as it appears in the record, that he tried to get initially to the point where he was told to go for the conference, the Panther headquarters, and he couldn't get there because there was a barricade. That's not a police line.

He left, and he reported this fact to his station, and was told a few minutes later to go back, they will now let you in. That's not the way we identify public authority.

And this becomes even clearer because the statement that was read, which Mr. Pappas did hear outside in the street, and did report, said, in part, that they, the area people, will let the police into the area -- not into the store, as my brother said, but into the area -- provided they have a search warrant, provided they're gentlemanly, provided they bring the press.

Now, this is not the language of a police line. There is no question, as our court noted, that there were serious civil disorders, that these involved exclusion of the public from various areas of New Bedford; not by the police. We were dealing, in other words, with a situation amounting to, or smacking of anarchy, civil revolution, if you will.

And, indeed, while it's not in the record, the grand jury that questioned or sought to question Pappas did return some indictments against individuals in connection with conspiracy, with weapon offenses. And Pappas was asked about whether there was ammunition in the Panther headquarters.

And while I'm on that point, again I submit to the Court that there could have been no question in Mr. Pappas' mind what he was being interrogated about before the grand jury. It's true, the form of the subpoena was general; but perhaps it was necessarily general because the grand jury was not inquiring into a specific crime, Commonwealth vs. Jones, it was looking into a general situation: the disorders that

occurred in New Bedford at this time.

And Pappas was asked, and did respond, Was he there, and how he happened to be there, and the circumstances and so forth. So there was never any question in his mind that what they wanted to know from him, and the questions that he was asked that he refused to answer, all related to what he saw and heard in that Black Panther headquarters in this period of three hours that he was there. There never could have been any doubt in his mind, certainly at that point, as to what the grand jury wanted to know from him.

And the fact that he refused to answer questions, and the indictments I have referred to were nolle prossed by the district attorney subsequently because of his decision that there wasn't enough evidence; and maybe if they had gotten Pappas' evidence there would have been enough. But there certainly can't have been any question in his mind as to what he was being asked about.

So far as the facts are concerned, therefore, I would like to suggest to the Court --

Q When we get to the facts --

MR. HURLEY: Yes, Your Honor?

Q -- during the time that Pappas was in there, I assume the police authorities knew what was going on?

MR. HURLEY: That he was there and what --

Q No, they knew that the burning was going on,

and the barricades were up and everything?

MR. HURLEY: Yes, Your Honor, they did.

Q And they knew where the Black Panther headquarters was?

MR. HURLEY: Yes, Your Honor, I believe they did.

Q Couldn't they have gotten a search warrant and have found all of that?

MR. HURLEY: I suppose they could have.

Q Without Pappas.

MR. HURLEY: I think they could have, Your Honor. I think what may have been involved is this, and I think it may explain why these barricades were permitted to exist. I think a decision was made, and I'm not speaking of any personal knowledge, but I think a decision was made: Let's not move in, let's see if we can work this thing out by discussiong and settlement. Because there were negotiations going on with the groups involved. Let's stay back. Let's not put the police in. Let's not have --

Q Couldn't they also speculate, they might have decided: Well, we saw Pappas go in there, we can subpoena him and find out what's in there?

MR. HURLEY: I think that's a possibility, Your Honor. But I think it is no more --

Q That's the trouble when you get off into possibilities.

MR. HURLEY: Beg pardon?

Q That's the trouble when you get into possibilities. But it's not a question of a possibility, a search warrant could have been obtained.

MR. HURLEY: I believe that -- I cannot say, Your Honor, that it could have been. I don't know that at that point they had enough evidence. Truthfully, I don't. It's possible they didn't know, that they only suspected, that there wasn't enough evidence to get it. Truthfully, I can't say yes or no.

But let's assume that they could --

Q But he did appear before the grand jury, he did answer --

MR. HURLEY: He did appear, yes.

Q -- questions up to that that he said were given to him in confidence?

MR. HURLEY: He told that he was there, and that he made this agreement, and then he said, you know, when they started asking him about what he saw and heard in the headquarters, he declined.

Q And is Mr. Prettyman correct, that the Commonwealth put in no evidence to show any basic need for this?

MR. HURLEY: At this point, no, Your Honor, I don't -- I don't --

Q Well, I'm asking you: did the Commonwealth put

in any testimony up until today on that?

MR. HURLEY: There has never been any occasion to give any until today, Your Honor, and I submit there was no occasion then --

Q Why not?

MR. HURLEY: -- because of the procedural context at that time.

Now, what happened was this: Pappas -- and, incidentally, Pappas had already made one appearance before this grand jury previously and then was summoned again.

Pappas got the subpoena, and there was a motion to quash. Now, procedurally, the question before the Superior Court judge was whether or not Pappas had a privilege, as he claimed, and there's no question he claimed it from the outset, a qualified privilege not to give his evidence because he was a newsman and because he got that evidence in confidence as a newsman.

The Superior Court, in effect, said: Look, let's assume that's so. There is no law giving you that privilege. At least until now, and I say until this day, until this Court acts on these cases; there's no law giving a newsman such a privilege as a general proposition. And the Superior Court judge reported the matter to the Supreme Judicial Court for determination.

There is no opportunity, there's no occasion, there's

no need for the Commonwealth to come forward at that point and say, Well, the issue here is whether or not he's got a privilege; but we're now going to put in evidence as to why we need his testimony.

As a matter of fact, Your Honor, with respect, I think the inference that you can draw from all the evidence is that there was a need. The situation I've outlined: Pappas, the evidence is, was the only non-Panther in the headquarters. And therefore I would say that there was no occasion, there still is no occasion for the Commonwealth to meet any burden, and unless and until this Court says there is a privilege, then there is no burden.

Q So the answer to my question is you did not?

MR. HURLEY: The Commonwealth has not.

Q Right.

MR. HURLEY: The Commonwealth did cross-examine Pappas, that is the only extent to which the Commonwealth participated, presented any evidence; yes, Your Honor, that's true.

But I say there was no need, there was no occasion.

Now, if this Court rules that there is a privilege, then the burden would arise, and presumably would be met.

But, until that, I submit there is no occasion for it, there is no burden on the Commonwealth.

Now, --

Q General Hurley, --

MR. HURLEY: Yes, Your Honor?

Q -- does Massachusetts procedure provide for motion to quash a criminal subpoena on the ground of oppressiveness or burdensomeness?

MR. HURLEY: Yes, Your Honor. I think our court has recognized that in its decision in this case.

Q And would Massachusetts procedure there require -- supposing some other claim, other than a reporter's privilege, were asserted; would Massachusetts procedure require that the State bear the burden or that the person claiming the oppressiveness or burdensomeness bear the burden?

MR. HURLEY: Well, if Your Honor please, I would say this: That the burden is and should be on the one who claims the exemption. I say that should be true of a newsman or anyone.

Suppose I were subpoenaed, for example, to testify before a grand jury in the western part of the State on a matter about which, obviously, I know nothing? I think the burden is on me to come to the court and say: Look, they're subpoenaing me, and I have no knowledge of this situation; why do I have to make this trip?

But I think the burden is on me, and then it would be up to the court, the burden would not shift, but perhaps the burden of going forward would shift to the Commonwealth:

Why are you subpoenaing this individual?

And I think this is no different, whether there's a question of invocation of a right to maintain a confidence or that I have nothing to contribute, I'm being harassed, they've got the wrong man. Our court recognizes this.

Q Of course, I suppose Pappas's position is that he did make some sort of a showing, of the nature of burdensomeness or oppressiveness. And, as Justice Marshall pointed out, the State came back with nothing.

MR. HURLEY: Well, has he made a showing, really, Your Honor? Or has the press at all made a showing? Beyond the statement that it is necessary that we have this right or our news sources are going to dry up.

I mean, Pappas said that. He said that, himself, before the Superior Court judge who heard it. But does that -- what does that really prove? I mean, if you will, go beyond the record in this case, and I say there's nothing really here that proves that there is a need for such a privilege.

But let's go into the Caldwell affidavit, and if you take the affidavits of the many eminent and respected newsmen there, I was struck by this fact: that each one there is saying that "I get a great deal of information in confidence." This is also borne out by the Guest and Stanzler survey, which was mentioned in argument this morning. "I get a great deal of information in confidence. Unless you give me a privilege,

people aren't going to come to me and give me information in confidence."

But the short answer is, not to give a short answer, there's no privilege now, as was pointed out this morning, there never has been, and yet they're getting the information.

So that, to say "We're not going to get information in the future unless you recognize this privilege", it seems to me is not a logical consequence from the fact they've been getting information over the years in confidence, even though there is no privilege.

I wonder, as a practical matter, how much attention does the informant pay to this question at all? I wonder, for example, if the Panthers had been asked that night: Now, do you really expect that not only is Paul Pappas not going to report anything he hears in there, but he's never going to testify about it? Of if he's questioned, for example, there was mentioned, if there was a fight or an injury or a murder, that he's not going to answer police questioning; is that what you really mean?

They didn't say that. The language of the agreement was "report", and I really wonder how much attention informants pay to this privilege. And I want to point --

Q How much attention do you think the Black Panthers would pay to Pappas if he testified?

MR. HURLEY: I'm sure, Your Honor, that he would --

if he testified, the Black Panthers would be unhappy. But --

[Laughter.]

-- as was pointed out in the Caldwell case, and I think it's important here, that the Panthers present an unusually sensitive news source, and it seems to me the Caldwell decision, as it states, both in the District Court and the Court of Appeals, in this case, on these facts, and we're dealing with an unusually sensitive news source; but I don't think a general rule can be made on that basis. I don't think that proves, just because there may be some source which is unduly sensitive, that all sources are so sensitive, that it rises to the level of --

Q Do you, in your position as Assistant Attorney General, ever talk to newspapermen in confidence?

MR. HURLEY: Ever talk to them?

Q In confidence?

MR. HURLEY: Oh, by all means, Your Honor.

Q Would you, if they ever testified against you, would you ever talk to them again in confidence?

MR. HURLEY: Testify -- I would. Because I would not --

Q You would still talk to them in confidence?

MR. HURLEY: I would, because I would not regard testifying as a breach of the agreement, because I would not expect that if I said to a reporter, "You can't print this";

that's not an agreement. That if he's called to the witness stand and questioned, that he is supposed to suffer in silence for my sake.

Q Well, I'll have to add one little point. He wasn't called, he volunteered.

MR. HURLEY: If he volunteered to testify?

Q Yes.

MR. HURLEY: I would --

Q Before a legislative committee that had your appointment up. Would you talk to him in confidence after that?

MR. HURLEY: I truthfully doubt if I would, yes, Your Honor. I think that would go -- that would approach breaking the confidence.

But that's not what we're dealing with here.

Q Well, you wouldn't talk to me in confidence or out of confidence after that, would you?

[Laughter.]

MR. HURLEY: Well, fortunately, I'm not up for appointment, so that --

[Laughter.]

Q And it's quite a different case.

MR. HURLEY: It is. It is a different situation.

I would point out that Judge Smith, in the Superior Court, hearing this, pointed this fact out to Pappas: that I've talked to newsmen for forty years in confidence and never

a one has broken my confidence. And I respect you, even though I think you're wrong, I respect you for preserving the confidence, or seeking to preserve it. But that's not the legal issue, and I've got to report it to the Supreme Judicial Court because I have no right to rule that you have the right to be silent.

So we're not -- it's not a --

Q If he was subpoenaed before a grand jury and testified, you would not hold that against him.

MR. HURLEY: I would not, Your Honor.

Q I'm sure you wouldn't. I wouldn't, either.

MR. HURLEY: Because I would not regard that as a breach of the agreement, a breach of the confidence.

Q Right.

MR. HURLEY: I wonder whether the Panthers really would regard it as a breach. They wouldn't like it, but I wonder if they'd really regard it as a breach of the confidence, viewing it as --

Q I certainly wouldn't put you in the same category.

Q Mr. Hurley, though wouldn't it be fair to say that the flow of information might be cut down even though there wasn't a breach of confidence, just because the first time you had not contemplated the possibility of a grand jury investigation; even though it was not a breach of confidence,

it was a publication or identification of you with the information that you don't want to take a chance on having it come about again?

MR. HURLEY: Well, Your Honor, I'm not saying that the newsman is unprotected. The only question is how do we do it? Do we hand him a shield, as it were, and let him put that up and say, All I have to prove is I'm a newsman and I got it in confidence, now you come forward -- and I don't have time, Your Honors; but if you look at the burden that the Pappas contention would place on the State, it would just destroy the grand jury system as completely unworkable.

So I'm not saying that you don't ever protect him in advance, all I'm saying is: How do you do it? You do it the way our court said you do it.

Mr. Pappas comes in and says, "I got this in confidence." And the court's got to make a determination, including hearing from the government, Why do you need this man? Why do you need his evidence? Make a determination on an individual case basis.

Q But you wouldn't make it a constitutional rule, in any event?

MR. HURLEY: No, Your Honor, I wouldn't. I don't think you have to. I think it's unworkable, it's unrealistic, and it's unnecessary.

I'm interested, for example, just quickly, looking

at the appendix in Caldwell, all the 121 subpoenas that were served on NBC and ABC over 31 months -- first of all, only 72 of them were in criminal cases; 18 in grand juries. And 43 of them in criminal cases were by the defendant, not by the prosecution. And out of all those that were served by the prosecution, and there are 121, excluding three that came out of the Caldwell grand jury, there's only one that I would describe as possibly seeking confidential information from a reporter.

And that was a subpoena to a station to bring in, in effect, everything you've got on the Mafia, Cosa Nostra, and some other named individuals.

The only one that you could possibly say, of all these 121, only seven of them were subpoenas ad testificandum, and those were all served by defendants in criminal cases.

So I wonder, really, is this the practical problem? The evidence of those subpoenas suggest to me that it isn't the practical problem. We are dealing with the unusual situation.

I don't mean to minimize the importance of the problem by saying it really occurred. But what I am saying is that the solution is not in ruling that every newsman's got a constitutional right, and he's got to have it.

We give an attorney a privilege. Why? To do his job.

Can it really be said that every newsman, to do his

job, has got to have an analogous and a greater privilege? Because the newsman privilege would be greater than my privilege, as I understand it, because not everything I get in confidence from a client is privileged. If he tells me he's going to commit a crime, I'm not privileged not to testify; and yet the newsman would be.

And the answer is, by doing it on an individual basis, either under legislation if the Legislature sees fit to enact it, or let the court protect, as the court protects every citizen, against unreasonable inquiry.

And the individual doesn't have to prove that the whole inquiry is unreasonable or oppressive, as my brother suggests, I think, but only that the questions directed to him are unreasonable.

And, finally, as a practical matter, we all know, as practical men, prosecutors don't pick fights with the press. We know reporters work out accommodations. Reporters do come forward. Everybody learns in public life, you don't pick fights with the press because they go to press every day.

I wonder, therefore, are we going to leave the press as helpless as it is suggested, if this privilege is not held to exist.

I think it was Oscar Wilde who said: In America the President reigns -- and that's his word not mine -- for four years, but the press rules forever.

And I think there's a great deal of practical common sense in saying: Sure, let's protect the reporter in his confidence when, in a particular case, it is shown, as a result of a judicial inquiry, that the harm to him, in his capacity as a reporter, is -- outweighs the public good that would be served.

And, remember, we're talking -- I'm finished, Your Honor.

MR. CHIEF JUSTICE BURGER: You may finish your sentence.

MR. HURLEY: I just wanted to say, we're talking here, as I think my brothers agree, not about a right that exists for the press, it's a public right, and the question in each case is: This public right, the two sides of the same coin, which is more important in the particular case, the public's right to know through the press or the public's right to know through the court?

And that's the problem that's got to be resolved.

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

Mr. Prettyman -- oh, excuse me. Excuse me. We're not ready for you yet, Mr. Prettyman.

Mr. Reynolds.

I take it that you're going to focus your argument, as a friend of the Court, specifically as it relates to this case.

ORAL ARGUMENT OF WILLIAM BRADFORD REYNOLDS, ESQ.,
ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

MR. REYNOLDS: Right. Your Honor, I believe that my argument earlier will pertain equally to this case as it did to the former case. The general question of whether a constitutional privilege should be recognized in the First Amendment.

MR. CHIEF JUSTICE BURGER: All I had in mind is that you need not repeat your former argument.

MR. REYNOLDS: No, I really intend merely to make a couple of additional observations, noting that my former argument applies here equally.

Our position is, of course, that no constitutional privilege exists in the First Amendment now, and one should not be recognized.

I think a point that should be brought out is that even apart from that the arguments in these cases, talking about the constitutional privilege, focus on a particular test of some showing that the government must make.

Generally a balancing test that is exceedingly difficult to apply, a balancing test which is found nowhere with respect to any other personal privileges, privileges pertaining to personal relationships.

Particularly a distinction is made between serious and less serious crimes, between what are called major crimes

or victimless crimes, I believe, that's how it's characterized in the briefs. A distinction which, as far as I can determine, is wholly detached from legislative judgment.

If Congress has seen fit to make a victimless crime, as it's referred to, that a crime as a matter of determination, their legislative determination, and it's constitutional, we see no basis for drawing lines in formulating some constitutional rule which would distinguish between something that is a major crime as opposed to a victimless crime.

Also, this rule turns on a showing by the government that no other sources of information are available.

Suppose you have an informer who's unreliable, and you want to call a reporter in order to show reliability? Or supposing the informer is in fact reliable, but he would make a bad witness? Is this a situation where we should say that there are no other sources available?

And what about the whole notion of cumulative evidence, and the importance of that? How is a judge to measure whether or not cumulative evidence is or is not important, in determining the function of the grand jury?

I think that these are extremely difficult questions in trying to formulate a test of the nature that's proposed, as a matter of constitutional law.

And then, moreover, Mr. Prettyman pointed out, the balancing test is one that turns on the particular facts of

each case, ad hoc test, which seems to suggest that there would always be a litigable issue involved, resulting in substantial and considerable delay. And such delays, we feel, would make an important difference, when you're talking about the grand jury process.

The statutes of limitation run; you have problems of questions of speedy trials, and determinations of that nature, which make a difference, a substantial difference when you're talking about a grand jury as opposed to an investigation by a legislative committee, where it is looking into the matters which result in legislation.

It seems that those considerations are important ones, when you're trying to formulate some kind of a constitutional test.

I would just point out that such delays can be avoided and probably would be avoided under the guidelines that the Attorney General has proposed. You would not have such litigable interruptions.

We think that that is an important distinction between the constitutional proposition that is presented and the guidelines that were spoken of earlier.

That's all.

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

Mr. Prettyman, you have about three minutes left.

REBUTTAL ARGUMENT OF E. BARRETT PRETTYMAN, JR., ESQ.,
ON BEHALF OF THE PETITIONER

MR. PRETTYMAN: I have only two brief points, Your Honor, in response to Mr. Justice Stewart.

My brother over here indicated that this was an instance of Mr. Pappas silencing himself as the price of the story.

There's nothing improper in that. There was a case a few years ago where a camera crew went into a Massachusetts mental hospital and agreed in advance to keep in confidence, not to publish the actual faces and names of the people in there; to reserve that confidence.

You can imagine a labor leader who's still at home and the press is clamoring for an interview, and he might say: Come in, you can set up your cameras and have an interview; but not in relation to my family. That's anything you see or hear is in confidence; they are not part of the story.

This kind of thing, where you impose a confidence in regard to one thing in order to get the larger story, is very common, and part of getting and disseminating the news.

Q But in this case, Mr. Prettyman, there never was a story, larger or smaller.

MR. PRETTYMAN: But that was only by the happenstance that the raid didn't come off, not --

Q Yes, yes, I understand.

MR. PRETTYMAN: If there had been a raid that night, could we possibly say that the constitutional issue turns on the fact that the raid was there and he covered it and published it, whereas, because the police -- perhaps they even know he was there; I don't know -- didn't --

Q My question didn't imply that I thought there was any impropriety. I was just differentiating this case from the other two, insofar as that in the other two cases there were stories published in the newspapers.

MR. PRETTYMAN: No question about that.

The only other thing I want to say is that I submit to you that it's more important than an occasional indictment, that an Earl Caldwell be allowed to do in-depth stories on the Black Panthers, that Mr. Branzburg be allowed to show that hashish is available, readily available to kids in two counties in Kentucky, that Mr. Pappas be allowed to report a police raid from the inside. We know these stories would never get to the public if it were not for the confidentiality and for the fact that the people who gave them permission thought that they were entitled to impose a privilege.

The Justice concurring in the Knops case said it better than I could: I know of no period in history where any freedoms have flourished in the face of the State's curtailment of the free flow of information.

That's what we're fighting for here.

Q Why do you suppose, Mr. Prettyman -- maybe you've indicated it already; but what, in your view, accounts for the fact that this basic question is arising now for the first time, after almost 200 years since we had a First Amendment and had a free press and had grand juries?

MR. PRETTYMAN: Yes. I think there are a number of factors, Your Honor. In the first place, I think there has been much agreement between prosecutors and newsmen over the years in the past.

I think that, in addition to that, that there has been a flood of subpoenas more recently, as we get into the problem of minorities and radical groups, we have our reporters today doing things they never did before, reporters themselves -- I used to be one -- will tell you that our reporters today are much more investigative, more sophisticated, more daring. Here's Pappas, who put his life on the life by being inside a headquarters in order to report from the inside.

This, I think, is of relatively recent origin, when combined, also, with the concept on the part of the prosecutor that here is a man who's on the scene, and who could provide an available investigative arm of the government. All these things have come to the front at a sudden time, just in the way that, perhaps in Griswold, the question which you think would go back for a hundred years did not arise until that particular case.

Q It's a combination of things that have all coalesced about the same time?

MR. PRETTYMAN: That's correct.

And as my brother suggested a few minutes ago, here in the course of a year and a half NBC and CBS were getting four subpoenas a month recently. They didn't get those kind of subpoenas back in the old days. 123 subpoenas between January '69 and July of '70.

And if this Court affirms this case, I can assure you that reporters will be spending a lot more time in grand juries and courtrooms than they are in reporting from now on.

Q Mr. Prettyman, another hypothetical, since we've got to test all of these propositions: Suppose on going into the headquarters the reporter was horrified to find, as I am sure he would be horrified if he found what I'm about to suggest, a great arsenal that had 20 flame throwers, 50 machine guns, a whole stack of automatic rifles, cases and boxes full of dynamite for making bombs.

Your test would mean that he would have his lips sealed and he cannot tell that to the grand jury investigating this whole problem of potential disorder and civil disturbance.

MR.PRETTYMAN: My test would mean only, Your Honor, that the court might, in that instance, have little difficulty in indicating, particularly if the ammunition had been used, had been part of some greater difficulty, might have, in balancin

the interest might well find in that case that the interest of the prosecutor and of the grand jury, if you will, overrode the First Amendment.

But the privilege would come into effect, yes. Because he was there and saw it under a confidential umbrella.

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

Q Mr. Prettyman, if I can bother you with one more question --

MR. PRETTYMAN: Certainly.

Q -- I wondered about your reference to the Wiseman case -- and I think it was the Wiseman case --

MR. PRETTYMAN: It was, the Commonwealth vs. --

Q -- as an example of the routine effect of an off-the-record or, rather, an agreed private filming.

Here the newsman is relying on the confidential agreement, the agreement as to confidence. There he broke it. And, hence, I wonder whether your reference to it is rather an unfortunate one?

MR. PRETTYMAN: No, I think, if I may suggest it, it's a very fortunate one because the confidence was deemed of such order in that case that they actually enforced it. In other words, I'm using the case as an illustration that a confidence rather than being improper and a way to silence the reporter was, in that case, a way of getting a larger story.

And if they had abided by the agreement that they had entered into and had taken films which did not show inmates without their permission, then that would have been an instance of a story of great benefit to the public, where they, nevertheless, could have gotten it only by agreeing to a confidentiality.

Q My point was the reporter made the deal and then wanted to break it.

MR. PRETTYMAN: No question about it. That's right.

But I think the fact that he attempted to break it, and that the court saw it of such a high order to enforce it by injunction --

Q But did you not have some other intervening First Amendment rights of other people? The rights of these prisoners not to be on television, standing around in the nude as they were, herded almost in animal-like fashion, and a great many other indignities. There's a very great difference with the intervention of the individual rights of those prisoners.

MR. PRETTYMAN: Quite true. And you're going to have instances of clashes in these cases occasionally, between the Sixth Amendment right to call witnesses, First Amendment right of the reporter. This is nothing new. These kinds of clashes and balances are quite common in constitutional adjudication, the kind that the courts face constantly.

And the courts are facing them right now, below.

And finally, I might say, deciding them in our favor.

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

Thank you, Mr. Hurley.

Thank you, Mr. Reynolds.

The case is submitted.

[Whereupon, at 2:25 o'clock, p.m., the case was submitted.]