The Emerging Constitutional Privilege to Conceal Confidential News Sources
COMMENTS

THE EMERGING CONSTITUTIONAL PRIVILEGE TO CONCEAL CONFIDENTIAL NEWS SOURCES

In furtherance of the national interest in an informed populace, the American press has evolved into a sophisticated and complex system of news reporting that is universal in scope. Although methods of accumulating and disseminating data have changed with technological advancement, the people have continued to be the primary source of news reports. Communications from source to media frequently are conducted in confidence, with the anonymity of the informant being a condition precedent to disclosure of the information. Legal problems develop when the newsman is called upon to reveal the identity of his confidential source in a judicial or legislative fact-finding proceeding.

Historically, the courts have not recognized any common law privilege to conceal news sources and consistently have ordered disclosure, often using criminal contempt as a mode of enforcement. With the exception of the few states that have adopted privilege statutes, most jurisdictions have failed to respond to any arguments proposed in support of a newsman’s privilege.

4 The primary arguments advanced in favor of a journalistic privilege to conceal sources have included: (1) Code of Ethics (2) forfeiture of estate (3) employer’s regulations (4) relevance and (5) self-incrimination. See D’Alemberte, Journalists Under the Axe: Protection of Confidential Sources of Information, 6 HARV. J. LEGIS. 307, 314-22 (1969).
Recently, however, reporters have contended that a privilege not to reveal confidential news sources is protected by the first amendment guarantee of freedom of the press. Having some promise of success from the beginning,\(^6\) the argument for a constitutionally based privilege has gained momentum following its recent adoption by the Ninth Circuit. The purpose of this Comment is to evaluate the constitutional privilege to conceal confidential news sources, as expressed in *Caldwell v. United States*,\(^6\) and to assess the probable impact of that decision upon the further development of a journalistic privilege.

I. THE FIRST AMENDMENT AS A BASIS FOR THE NEWSMAN'S PRIVILEGE

Although the United States Supreme Court has never ruled on the issue of the newsman's constitutional privilege,\(^7\) it has consistently main-

The newsman's Code of Ethics forbids disclosure of confidential sources before judicial or investigatory bodies. However, the courts have uniformly held that ethical considerations must yield when in conflict with the interests of justice. See Clein v. State, 52 So. 2d 117 (Fla. 1950); *In re Wayne*, 4 Hawaii Dist. Ct. 475 (1914).

The contention that forced disclosure renders the reporter unable to collect information and ultimately results in loss of his job has not been successful. This argument is akin to an equally fruitless objection that disclosure violates the newsman's rules of employment. *See* Plunkett v. Hamilton, 136 Ga. 72, 70 S.E. 781 (1911); People *ex rel.* Phelps v. Fancher, 2 Hun 226 (N.Y. 1874). *See also In re Wayne*, 4 Hawaii Dist. Ct. 475 (1914).

Disclosure has not been required where the identity of the confidential source has been shown to be irrelevant and immaterial to the proceedings. *See* Rosenberg v. Carroll, 99 F. Supp. 629 (S.D.N.Y. 1951). On the other hand, where the information might lead to the discovery of admissible evidence, disclosure has been ordered. *See* Brewster v. Boston Herald-Traveler Corp., 20 F.R.D. 416 (D. Mass. 1957); *In re Goodfader*, 45 Hawaii 317, 367 P.2d 472 (1961). *But see* Garland v. Torre, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958) (confidential information went to the "heart of plaintiff's claim").

As a witness, the newsman may refuse to answer any question which may tend to incriminate him. However, there is only one case in which a journalist has invoked the fifth amendment privilege to avoid disclosure of his source. *See* Burdick v. United States, 236 U.S. 79 (1915). *See also* Joslyn v. People, 67 Colo. 297, 184 P. 375 (1919) (counsel advised newsman of privilege against self-incrimination but reporter chose not to exercise the right).


\(^6\) 434 F.2d 1081 (9th Cir. 1970), *cert. granted*, 91 S.Ct. 1616 (1971).


However, as this paper goes to press, certiorari has been granted in the *Caldwell* case. *See* note 6 *supra.*
tained that freedom of the press must be liberally extended in order to advance the "spectrum of available knowledge." Free press is said to rest on the "assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, [and] that a free press is a condition of a free society." Compulsory disclosure of confidential news sources before a legislative or judicial proceeding causes an abridgement of the freedom of the press primarily by imposing a significant practical restraint upon the flow of information from source to news media, and consequently upon the flow of news to the public who have a right to be informed. Opponents of the privilege maintain that any effect on the flow of news is entirely speculative. Indirect restraints upon liberty are often indefi-


The Supreme Court in Bridges v. California declared that "the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society." 314 U.S. 252, 265 (1941).


11 The primary objection to recognition of a constitutional newsman's privilege has been that forced disclosure has no effect upon the flow of information to the public, and therefore does not in fact abridge the freedom of the press. The following language of the New York Law Revision Commission is often cited in this regard:

[T]he present absence of a privilege to newsmen does not infringe on freedom of the press. There is no more infringement of constitutional rights in compelling a newsmen to disclose the sources of his information than there is in compelling any other person to make a disclosure. No limitation whatever on the right to publish is imposed.

1949 N.Y. LAW REVISION COMM'N ANN. REP. 27. This statement was based on a finding of no perceptible difference in the flow of news in states having journalists' privilege statutes than in states providing no such sanction. 1949 N.Y. LAW REVISION COMM'N ANN. REP. 35.

Other attacks upon the proposed constitutional privilege have been less convincing. Some student material has pointed to the paucity of cases in which the issue has been raised as supporting the position that forced disclosure does not impede the flow of news. See Comment, Compulsory Disclosure of a Newsman's Source: A Compromise Proposal, 54 NW. U.L. REV. 243, 246-47 & n.23 (1959); 82 HARV. L. REV. 1384, 1386 (1969); 61 MICH. L. REV. 184, 189 (1962). Others have insisted that since practically without exception newsmen have been willing to go to jail rather than disclose their source, the privilege is unnecessary. See Note, The Right of a Newsman to Refrain from Divulging the Sources of His Information, 36 VA. L. REV. 61 (1950); Comment, Conf-
nite, but it is well established that indirect as well as direct restraints may interfere with constitutional freedoms. Although it is admittedly impossible to calculate the number of potential sources who fail to come forward because of the threat of disclosure, knowledge of human nature suggests that some reticence results. Forced disclosure has no immediate effect upon the news flow, but its potential consequence is substantial.

First amendment freedoms, however, are not absolute rights. Where an otherwise valid exercise of governmental or legislative power results in an infringement of first amendment rights, the respective interests involved must be balanced. Specifically, the public interest in the power to compel testimony in a particular case must be of sufficient public importance to justify the encroachment upon freedom of the press resulting from forced disclosure.

Traditionally, the power of courts to compel testimony in the interest of discovering truth has been attributed immense public importance, as is evidenced by the infrequency of privileged relationships at common


12 The Supreme Court has protected anonymity where compelling disclosure of group affiliations would entail the "likelihood" of imposing a restraint upon the exercise of the first amendment freedom of association. NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 462 (1958).


18 The duty of a witness to testify in a judicial or legislative proceeding has been considered an incident to the judicial power of the United States. See United States v. Bryan, 339 U.S. 233 (1950); Blackmer v. United States, 284 U.S. 421 (1932); Blair v. United States, 250 U.S. 273 (1919); Wilson v. United States, 221 U.S. 361 (1911); Hale v. Henkel, 201 U.S. 43 (1906).
Where the right to "every man's evidence" conflicts with first amendment freedoms, a delicate and difficult task of balancing must be employed.

The prospect of a newsman's constitutional privilege has gained substantial support in decisions protecting anonymity where the first amendment freedom of expression has been threatened. In these cases, the fear of public exposure experienced by members of various controversial minority groups has been recognized as an important human influence, which in some circumstances merits protection in order to secure the free exercise of first amendment rights. It follows from the reasoning employed therein that compelling disclosure of confidential sources discourages expression of radical or unpopular views through the news media, and therefore has a chilling effect upon the source's exercise of his first amendment guarantee of freedom of expression. Moreover, as freedom of expression through the news media is curtailed, the unencumbered flow of news to the public is repressed in like degree, thereby constituting an abridgment of freedom of the press. The infringement occasioned by compulsory disclosure upon the aggregate and intertwined

---

19 Only the confidential communications between physician and patient, lawyer and client, husband and wife, and priest and penitent were privileged at common law. See State v. Buchanan, 436 P.2d 729, 730, n.4 (Ore.), cert. denied, 392 U.S. 905 (1968); Model Code of Evidence § 22-30 (1942) (Foreword by E. Morgan). Generally, a witness properly summoned must testify. Any variance from the rule is distinctly exceptional. 8 J. Wigmore, Evidence §§ 2190-92 (McNaughton rev. 1961).


23 The recent articulation of the "chilling effect" concept in constitutional law has had a substantial impact in the area of first amendment freedoms. Both procedural and substantive modifications have resulted from the recognition of a "duty to insulate all individuals from the 'chilling effect' upon exercise of First Amendment freedoms . . . ." Walker v. Birmingham, 388 U.S. 307, 345 (1967) (Brennan, J., dissenting). See cases cited notes 12 & 22 supra. For an excellent note on the concept of chilling as it has affected first amendment rights, see Note, The Chilling Effect in Constitutional Law, 69 Colum. L. Rev. 808, 822-26 (1969).
freedoms of press and expression justifies recognition of a first amend-
ment privilege to conceal confidential news sources.  

The argument for a constitutionally based newsman's privilege to
conceal confidential sources was first employed in Garland v. Torre.  
In a suit against the Columbia Broadcasting Company, a columni
was subpoenaed to reveal the source of alleged libelous remarks published in
her gossip column. She refused to disclose and was cited for contempt.
The Second Circuit assumed for purposes of deciding the case that
freedom of the press was involved, but upheld the contempt conviction
since the desired testimony "went to the heart of plaintiff's claim."  
Significantly, the Garland court observed that it was not dealing with a
situation involving wholesale disclosure of sources, nor with a case in
which the identity of the source was of doubtful relevance.  

Hawaii next encountered the dilemma in In re Goodfader.  
A former personnel director of the Civil Service Commission of Honolulu insti-
tuted suit against members of that body who allegedly precipitated her
discharge through an illegal conspiracy. A newspaper reporter ad-
mitted having prior knowledge of the dismissal, but refused to reveal his source. The Supreme Court of Hawaii ordered disclosure of the
source of information. Although ostensibly relying upon Garland;  
the Goodfader court actually departed from the spirit of that decision and,
for practical purposes, eliminated any balancing of conflicting interests.

---

24 Makeweight arguments may also be advanced that compulsory disclosure induces
self-censorship among reporters and impairs the autonomy of the news media, but these
are of little practical significance and are not essential to the existence of the con-
(1964); Smith v. California, 361 U.S. 147 (1959); Caldwell v. United States, 434 F.2d
1081 (9th Cir. 1970).

25 259 F.2d 545 (2d Cir.), cert. denied, 358 U.S. 910 (1958). The journalist con-
tended that to compel reporters to disclose their confidential sources would encroach
upon the freedom of the press guaranteed by the first amendment because "it would
impose an important practical restraint on the flow of news from news sources to
news media and would thus diminish pro tanto the flow of news to the public." Id.
at 547-48.

26 The opinion was recited by Judge (now Mr. Justice) Stewart.


28 Id. at 549.


The Goodfader court followed Garland in that it assumed for purposes of the suit
that compulsory disclosure of confidential new sources infringes upon the freedom of
The interest in compelling testimony was considered predominant as the court required only that the informant's identity be relevant in order to justify mandatory disclosure.

The Pennsylvania Supreme Court summarily held in *In re Taylor* that "by no stretch of language" could a privilege to conceal sources fall within the protection of the first amendment. Subsequently, in *State v. Buchanan* the highest court of Oregon took a rather unique position in ordering the reporter to disclose his source. The court held that freedom of the press exists for the public and does not confer special constitutional privileges upon members of the press. It is to be noted that the reporter based her argument solely upon her right to collect news, but failed to emphasize the practical importance of nondisclosure to an untrammeled flow of news to the public.

The foregoing cases indicate the general confusion that has characterized the development of a constitutionally based privilege to conceal confidential news sources. They also serve to accentuate the impact of the recent Ninth Circuit decision of *Caldwell v. United States* upon that privilege.

II. JUDICIAL RECOGNITION OF THE NEWSMAN'S PRIVILEGE

In the *Caldwell* case, a federal grand jury investigating possible criminal activities of the Black Panther Party issued a subpoena commanding

---

31 The *Goodfader* court cited out of context the following language from the *Garland* case:

If an additional First Amendment liberty—the freedom of the press—is here involved, we do not hesitate to conclude that it too must give place under the Constitution to a paramount public interest in the fair administration of justice. *Garland v. Torre*, 259 F.2d 545, 549 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).

This language, divorced from the strong implication in *Garland* that the public interest in the fair administration of justice may only be paramount where the identity of the source goes to the heart of the plaintiff's claim, offers some explanation for the holding in *Goodfader*.

32 There was one dissent on the grounds that the informant's identity in this case not only did not go to the heart of the plaintiff's claim, but also was of doubtful relevance and inadmissible as hearsay. *In re Goodfader*, 45 Hawai`i 317, 367 P.2d 472 (1961) (Mizuha, J., dissenting).


34 Id. at 35, 193 A.2d at 184.


36 The court correctly decided the issue as it was presented. See, e.g., Tribune Review Publishing Co. v. Thomas, 254 F.2d 883 (3d Cir. 1958); Brumfield v. State, 108 So. 2d 33 (Fla. 1958); United Press Ass'n v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954).

37 434 F.2d 1081 (9th Cir. 1970).
Earl Caldwell, a *New York Times* reporter, to appear and testify. Caldwell maintained that the issuance of a district court order granting him a qualified privilege was not sufficient to safeguard the constitutional freedoms at stake because his mere appearance would jeopardize the first amendment guarantee of freedom of the press.

The Ninth Circuit held that the first amendment extends to newsmen the privilege of concealing confidential sources until there is demonstrated a compelling and overriding interest that otherwise cannot be served. Furthermore, where attendance before a grand jury proceeding jeopardizes the public's first amendment right to be informed, the compelling need for the witness' presence must be shown before a subpoena might properly issue. Noting the unique bond of trust that Caldwell had established with the Black Panthers, and the peculiar sensitivity of that group to functions of the "establishment," the court directed that Caldwell need not appear before the grand jury because an unjustifiable injury to the freedom of the press would result.

*Caldwell* is the first case to recognize unequivocally a constitutionally based newsman's privilege to conceal confidential sources. For reasons

---

38 The protective order of the district court provided in pertinent part as follows:

(1) That [Caldwell] ... 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 for 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; ... Application of Caldwell, 311 F. Supp. 358, 362 (N.D. Cal. 1970). The described privilege is qualified in that the order is subject to modification upon a showing by the Government of a compelling national interest in the testimony which cannot be otherwise served. The United States did not contest this order on appeal to the Ninth Circuit.

Judge Zirpoli has again issued a protective order substantially identical to the one set out above in the more recent case of *In re Grand Jury Witnesses*, 322 F. Supp. 573 (N.D. Cal. 1970). Professional journalists employed by a militant organization's newspaper were called upon to testify before a grand jury when it was discovered that they had associated with persons advocating murder and destruction in the overthrow of the Government. The court ordered the journalists to testify, holding that an overriding national interest in the testimony outweighed any first amendment rights of association that the witnesses as individuals may have as well as any journalistic privilege in the area of free press to which they might be entitled. It is rather curious that no mention of the *Caldwell* case was made in the opinion.

39 Caldwell v. United States, 434 F.2d 1081, 1086 (9th Cir. 1970).

40 *Id.* at 1089.

41 Two prior decisions had assumed but not decided that the freedom of the press sanctions a privilege for newsmen. See Garland v. Torre, 259 F.2d 545 (2d Cir.), *cert.*
discussed previously in this Comment, such recognition is long overdue. Other important aspects of the decision now require analysis in order to assess its probable significance.

As Caldwell involved grand jury proceedings rather than private litigation, the Caldwell court adopted a qualification upon the reporter’s privilege from analogous cases limiting interrogation in legislative proceedings where the first amendment freedom of association was threatened. Consequently, under Caldwell the reporter may be forced to reveal confidential information only upon demonstration of a compelling national interest in the testimony that otherwise cannot be served. Although cast in language appropriate to grand jury procedure, the Caldwell qualification upon the newsman’s privilege is substantially the same as the “heart of the plaintiff’s claim” requirement set out in Garland for use in private litigation.

In affirming the lower court’s protective order, the Caldwell court adopted a newsman’s privilege that extends not only to the confidential source but to confidential information as well. To the extent that its holding protects confidential information, the Caldwell decision is unsound. The journalist’s privilege is desirable to protect the source who prefers anonymity so that he will not be reluctant in communicating information to the media for dissemination to the public. On the other hand, communications from news source to media by their nature contemplate public disclosure of the information. As long as the informant may freely come forward with news, the free flow of news to the public is secured. If the reporter wishes to conceal any of the information for personal reasons or as a favor to his source, he must do so at his peril—there is no constitutional basis for protecting the concealment of information obtained by the newsman.

In the overwhelming majority of situations, it is the forced disclosure of confidential sources rather than the reporter’s appearance before the grand jury which infringes upon first amendment liberties. Presented

\[\text{denied, 358 U.S. 910 (1958); In re Goodfader, 45 Hawaii 317, 367 P.2d 472 (1961).}\]

\[\text{42 See Garland v. Torre, 259 F.2d 545 (2d Cir.), cert. denied, 358 U.S. 910 (1958); In re Goodfader, 45 Hawaii 317, 367 P.2d 472 (1961).}\]


\[\text{44 Garland v. Torre, 259 F.2d 545 (2d Cir.), cert. denied, 358 U.S. 910 (1958).}\]

\[\text{45 See note 38 supra.}\]
with an unusually broad grand jury investigation and Caldwell's peculiar trust relationship with the extremely sensitive Black Panthers, the *Caldwell* court considered the reporter's appearance under the circumstances no different than actual disclosure in its effect upon freedom of the press. Consequently, the newsman's constitutional privilege was held to demand demonstration of a compelling need for the reporter's testimony before appearance before the grand jury could be required.

In extending protection to appearance before the grand jury, the *Caldwell* court emphasized that its holding was exceptional rather than indicative of any general rule. Courts seeking guidance on the issue of the newsman's privilege from the *Caldwell* decision hopefully will realize that the rule in *Caldwell* is indeed a "narrow one," and will exercise temperance in application of its broad principles.

III. Judicial Reaction to Caldwell

Subsequent to the *Caldwell* decision, two cases have dealt specifically with the newsman's constitutional privilege to conceal confidential sources. A possible indication of judicial reaction to the newsman's constitutional privilege may be found therein.

In *State v. Knops* a grand jury investigating an arson and fatal bombings on college campuses in Wisconsin issued a subpoena to the editor of a local newspaper who had published an article on the bombers. The editor's refusal to disclose his sources of information resulted in a contempt citation that was upheld on appeal. The Supreme Court of Wisconsin recognized a newsman's constitutionally protected privilege to conceal his confidential sources, but found that the nature of the violent crimes constituted an overriding state's interest in the witness' testimony. Consequently, the first amendment interests involved were required to yield to the paramount interest in the power of the grand jury to discover the truth through testimony.

This proper application of the principles underlying the *Caldwell* decision indicates that *Caldwell* may have the desirable effect of reducing judicial reluctance to recognize the existence of a constitutionally based reporter's privilege. Such reaction to *Caldwell* would lead not only to predictability of result in the area of the newsman's privilege, but more importantly would put an end to the violation of constitutional rights.

However, possible misapplication of the broad principles of *Caldwell*

---

46 *Caldwell* v. United States, 434 F.2d 1081, 1090 (9th Cir. 1970).

47 49 Wis. 2d 467, 183 N.W.2d 93 (1971).
is forecast in the concurring opinion in _Knops_: "We also hold, following _Caldwell_, as I understand the majority opinion, that the 'compelling and overriding interest' of the state must be demonstrated to the court as a prerequisite for the issuance of a subpoena . . . ." 48 In _Knops_, none of the special circumstances existed which were determinative in _Caldwell's_ extension of protection to appearance before the grand jury. There was neither a peculiar trust relationship between source and reporter nor a singular sensitivity to activities of the news media short of actual disclosure.

In order that the _Caldwell_ decision not foster continued confusion in the growing area of the newsman's constitutional privilege, it is imperative that the extension of constitutional protection to appearance before the grand jury be recognized as justified only upon special facts. If constitutional protection is extended to appearance before a grand jury in all cases, the sound basis for the newsman's privilege at the point of disclosure will become obscured. The result will be unnecessary confusion and expense in altering grand jury procedure to protect illusory infringements upon first amendment freedoms.

On the other hand, the highest court of Massachusetts in _In re Pappas_49 has rejected the "broad conclusions" 50 of the _Caldwell_ decision as "judicial amendment of the Constitution." 51 A reporter who was allowed to enter Black Panther headquarters during a civil disorder was subpoenaed to testify before a grand jury. Refusing to recognize a constitutional privilege for newsmen, the court held that judicial discretion over inquiry is sufficient to protect the interests involved, and ordered the reporter to disclose his confidential sources.

The principal obstacle to recognition of a newsman's privilege has long been judicial reluctance in surrendering power over witnesses.52 In an effort to preserve that power, courts as in _Pappas_ have refused to recognize that freedom of the press is at stake in the area of forced disclosure of confidential news sources. Ironically, protection of freedom of the press in this situation does not contemplate a wholesale sacrifice of the power to compel testimony. Rather, the conflicting interests under _Caldwell_ are afforded both adequate protection and due recogni-

48 Id. at 653, 183 N.W.2d at 99-100.
50 Id. at —, 266 N.E.2d at 302.
51 Id.
52 See Garland v. Torre, 259 F.2d 545 (2d Cir.), _cert. denied_, 358 U.S. 910 (1958); _In re Goodfader_, 45 Hawaii 317, 367 P.2d.472 (1961); notes 2 & 21-23 supra.
tion. The holding in Pappas indicates, however, that the development of a constitutional newsman’s privilege may continue to be repressed by inherent prejudice toward any testimonial privilege.

IV. Conclusion

It is unfortunate that the long awaited judicial recognition of a newsman’s constitutional privilege to conceal his confidential sources should find expression in the special circumstances of the Caldwell decision. Convincing first amendment arguments against forced disclosure weaken and become dependent upon unique circumstances when protection is extended to a mere appearance before the grand jury. Moreover, in affirming the district court’s protective order, the Caldwell court adopted a too liberal privilege which protects confidential information as well as the confidential source. Only the privilege to conceal confidential sources may be justified upon sound application of constitutional principles. If Caldwell is to promote acceptance of the constitutional newsman’s privilege to conceal his confidential sources, rather than perpetuate the confusion surrounding the issue, subsequent decisions must adopt a reasonable interpretation of its underlying principles.53

J. W. P. III

53 Although this Comment has been confined to the judicial evolution of a newsman’s privilege to conceal his sources, it is appropriate to mention the prospect of privilege by congressional act.


The bill provides for a privilege against disclosure of both confidential information and the sources of information obtained by newsmen. The proposed privilege is subject to the following qualifications:

First, the privilege does not apply to the source of any allegedly defamatory information in a case where the defendant, in a civil action for defamation, asserts a defense based upon the source of such information. Second, the privilege shall not apply to the source of any information concerning the details of any grand jury or other proceeding which was required to be secret under the laws of the United States. Finally, the bill establishes procedures for divesting the privilege when there is substantial evidence that disclosure of information held confidential by the newsman is required to prevent a threat to human life, of espionage, or of foreign aggression.