



10-1971

In Matter of Pappas

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UNITED STATES v. CALDWELL 70-57
IN RE PAUL PAPPAS 70-94
BRANZBURG v. HAYES & MEIGS 70-85
Argued 2/23/72

Tentative Impressions*

Although the facts in these cases differ, counsel for the media - in the principal briefs and in the briefs amicus - are asserting a First Amendment right - a right of constitutional proportions - to a privilege against disclosing - in judicial or other proceedings - sources of information or confidential information.

Statements of this position vary. That in the brief on behalf of Branzburg (at p. 9) is typical:

"The First Amendment provides newsmen a privilege against compulsory appearances in closed proceedings and against compulsory disclosure of confidential information. In order to overcome this privilege, the state has the heavy burden of proving, by clear and convincing evidence, that the testimony of the reporter is absolutely necessary to prevent direct, immediate and irreparable prospective damage to the national security, human life or liberty. Any lesser burden does not adequately protect the press from state action which endangers the freedom of the press guaranteed by the First Amendment."

*These impressions are dictated on the afternoon following argument to record my initial and tentative impressions. I will have read, in preparation for the arguments, the principal briefs, some of the cases and the bench memo. I hope to do further study before the Conference. My views are subject to change and to the discussion at the Conference.

Prof. Bickel, representing the New York Times and various other media, states their position as follows:

"The First Amendment demands . . . that the reporter be protected. The standard of protection can be defined by objective criteria, and made self limiting in practice.

"A reporter cannot, consistently with the Constitution, be made to divulge confidences to a governmental investigative body unless three minimal tests have all been met. 1. The government must clearly show that there is probable cause to believe that the reporter possesses information which is specifically relevant to a specific probable violation of law. 2. The government must clearly show that the information it seeks cannot be obtained by alternative means, which is to say, from sources other than the reporter. 3. The government must clearly demonstrate a compelling and overriding interest in the information."

The decisions of the three courts differed materially. In Caldwell, the Ninth Circuit agreed substantially with the press - although its decision was narrowly drawn in light of the specific facts (the government had not introduced any evidence to show a need for the testimony).

In Branzburg, the court reached a different result from Caldwell. It decided that the reporter would have to testify before the grand jury, and it express^{ed} grave doubt as to whether there was any constitutional privilege. The reporter had not shown, as was true in Caldwell, that he had no information - other than stories already published - to disclose.

In Pappas, the Massachusetts court held flatly that there was no First Amendment privilege, qualified or absolute, available to newsmen.

My Tentative Views:

Caldwell: I would reverse Caldwell, as it went too far in establishing a constitutional right not even to testify at all.

Branzburg: I would affirm the holding, although I would not accept all of the reasoning of the court.

Pappas: It seems to me that the Massachusetts court may have been right in holding that there is no privilege as a matter of constitutional right, either absolute or qualified. But the Court did not give due weight to the importance of balancing First Amendment interests against the other interests involved. I would be inclined to reverse Pappas for reconsideration in light of the principles and guidelines established in this Court's opinion.

* * * * *

As to the controlling principles, I am tentatively inclined to share the view expressed by Justice Stewart in Garland v. Torpe, 259 F. 2d 545, namely, that there is no constitutional privilege

specifically available to newsmen. Mr. Justice Stewart also declined to recognize - as I read his opinion - even an "evidentiary privilege" (such as that available to a lawyer). He did emphasize the important First Amendment interest involved, and concluded that these needed to be balanced against the interest being served by the administration of justice (in the Garland case the need to have the testimony of a critical witness).

I have been interested in the protective order entered by Judge Meigs in the Branzburg case (Appendix 46) which purported to protect confidential sources and information, but required the witnesses to appear before the grand jury and to answer questions "which concern or pertain to any criminal act, the commission of which was actually observed by Branzburg."

Some elaboration and refinement of Judge Meigs approach might make sense. His qualification, for example, with respect to crimes "actually observed" is not broad enough. Crimes which might be planned or discussed in his presence should not be privileged.

Some of the "safeguards" proposed by counsel for the media - such as imposing a heavy burden on the state to show a "compelling and overriding interest", and to guarantee a public hearing prior to the newsmen being required to answer any question, go much too far.

L. F. P., Jr.

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(with some notes)

Handwritten notes at the bottom of the page, including a date and some illegible text.

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Direct Testimony (to Pappas)

Pappas advised to speak with
Pappas by subject to conduct report
of this case to court, regarding the
subject's conduct by subject's

If a court had occurred on Pappas's
journal, Pappas was aware the "testimony"
could be used to be used by a court

In 1979 of case the subject should
about - get an order of showing
evidence without

The
subject
testimony
was
in
the
court
could
be
used

subject is entitled to a hearing in every
case to determine whether or not
subject required to go before a court
other than by a court order to be used
in a trial

Prettyman (cont.)

In this case, Pappas - unlike Caldwell - did not make point that he did not have to go before jury. These facts of this case are different from Caldwell. Prettyman supports decision in Caldwell - at the time this case can be decided without ~~going~~ addressing the appearance point. Pappas appeared here.

x x x y

In this case, Mass. put on no evidence - saying burden was on Pappas

See cases cited by Prettyman as supporting privilege - note 48, p 40

Hurley (asst atty Gen)

Grand Jury was investigating - not a specific crime - conditions in New Bedford that threatened public order.

Mass. Ct. held no § const. privilege, ~~direct~~ absolute or qualified, but that judges may protect reporters in proper cases - as they have in past. - A 18.

Agatha (p. 53)

(anon)

The Court should ~~not~~ be
based on precedents & non-verbal
statements.

The "intentional act" - 29. 4. 1968
high court of justice - 10
minutes to apply

to the matter -

Does the defendant "knowingly"
& "voluntarily" do the act? -
not related to any legal
definition of intent.

Also that that act not be available
for the crime - might provide
evidence - corroborative evidence

Should not pursue act of this
kind Court