United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 8, 2004 Decided February 15, 2005
Reissued February 3, 2006

No. 04-3138

IN RE: GRAND JURY SUBPOENA, JUDITH MILLER

Consolidated with
04-3139, 04-3140

Appeals from the United States District Court
for the District of Columbia
(No. 04mc00407)
(No. 04mc00460)
(No. 04mc00461)

Floyd Abrams argued the cause for appellants. With him on the briefs was *Joel Kurtzberg*. *Donald J. Mulvihill* entered an appearance.

Reid Alan Cox was on the brief for *amicus curiae* Center for Individual Freedom in support of appellants.

Theodore J. Boutrous, Jr. and *Thomas H. Dupree, Jr.* were on the brief for *amici curiae* Magazine Publishers of America, Inc., et al. in support of appellants.

James P. Fleissner, Assistant U.S. Attorney, argued the cause and filed the brief for appellee.

SENTELLE, *Circuit Judge*, *concurring*: As noted in the opinion of the court, I write separately to express my differing basis for affirming the District Court on the common law privilege issue. I would hold that reporters refusing to testify before grand juries as to their "confidential sources" enjoy no common law privilege beyond the protection against harassing grand juries conducting groundless investigations that is available to all other citizens. While I understand, and do not actually disagree with, the conclusion of my colleagues that any such privilege enjoyed by the reporters has been overcome by the showing of the United States, and that we therefore need not determine whether such privilege exists, I find this ordering of issues a bit disturbing. To me, the question of the existence of such privilege *vel non* is logically anterior to the quantum of proof necessary to overcome it. While I understand Judge Henderson's theory that she cannot support a privilege afforded by the common law which would not be overcome by the quantum of proof offered by the government, I think it more logical to not reach the quantum question in the absence of a determination as to the existence of the privilege than to proceed the other way around.[1] That said, I fully join the conclusion that we should affirm the District Court's decision to hold the appellants in contempt, unswayed by their claim of protection of common law privilege. I write separately only to explain my reasons for rejecting the theory that such a privilege is known to the common law.

I base my rejection of the common law privilege theory on foundations of precedent, policy, and separation of powers. As to precedent, I find *Branzburg v. Hayes*, 408 U.S. 665 (1972), to be as dispositive of the question of common law privilege as it is of a First Amendment privilege. While *Branzburg* generally is cited for its constitutional implications, the *Branzburg* Court repeatedly discussed the privilege question in common law terms as well as constitutional. Indeed, the majority opinion by

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[1]See Opinion of Judge Tatel at pp. 5-9.