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United States District Court  
For The District of Columbia

**FILED**

DEC 18 1972

JAMES F. DAVEY, Clerk

UNITED STATES OF AMERICA )  
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 vs )  
 )  
 GEORGE GORDON LIDDY, ET AL )

Criminal No. 1827-72

**TRANSCRIPT OF PROCEEDINGS**

Friday, December 15, 1972

(Motion by Times Mirror Company for Extension  
of Return Date of Subpoenas)

COPY FOR: Court File

PAGES: 1-10

NICHOLAS SOKAL  
OFFICIAL REPORTER  
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DOCKET ENTRY REFLECTS THAT CASE WAS CALLED FOR SOLE PURPOSE OF HEARING MOTION BY TIMES MIRROR CO, PUBLISHER OF THE LOS ANGELES TIMES FOR AN EXTENSION OF RETURN DATE OF SUBPOENA. THE DOCKET ENTRY FOR DEC. 15, 1972, ALSO REFLECTS THAT A BENCH CONFERENCE ALSO WAS HELD IN CONNECTION WITH ANOTHER ASPECT OF THE CASE WHICH WAS ORD RED SEALED. The transcript of the proceedings of Dec. 15, 1972, pages 1-10, were filed on Dec. 15, 1972. However, docket does not reflect that the sealed portions of what ~~was~~ discussed at the bench on that date concerning another aspect of the case was filed by the Court Report (Nicholas Sokal) subsequent to that date.

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA            )  
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  )           Criminal No. 1827-72  
  )  
GEORGE GORDON LIDDY, et al         )

Friday, December 15, 1972

The above-entitled cause came on for hearing of  
Motion by Times Mirror (Publisher of Los Angeles Times) for  
Extension of Return Date of Subpoenas, at 2:00 o'clock p.m.,  
before THE HONORABLE CHIEF JUDGE JOHN J. SIRICA.

APPEARANCES:

On Behalf of the United States:

EARL SILBERT, Ass't. U.S. Attorney  
SEYMOUR GLANZER, Ass't. U.S. Attorney  
DONALD CAMPBELL, Ass't. U.S. Attorney

On Behalf of Defendant Howard Hunt:

WILLIAM O. BITTMAN, Esq.  
AUSTIN S. MITTLER, Esq.

On Behalf of Times Mirror Company:

TIMOTHY B. DYK, Esq.

Also Present:

J. ROGER WOLLENBERG, Esq.  
HERBERT J. MILLER, Esq.

P R O C E E D I N G S

THE COURT: Good afternoon.

MR. BITTMAN: Good afternoon, Your Honor.

Your Honor, before we begin the proceedings this afternoon could Mr. Silbert and I briefly approach the bench?

THE COURT: Surely.

(At-the-Bench proceedings ordered sealed by the Court.)

OPEN COURT

THE COURT: Who represents the moving party? Mr. Dyk, is it?

MR. DYK: May it please the Court: my name is Timothy Dyk and I represent the Times Mirror Company.

Now that we are a party to the case I can't say that we are entirely happy to be here. Mr. Herbert Miller, who represents Mr. Ostrow, and Mr. Nelson, is here also and I believe he would like to address a few words to the Court when I have concluded.

The subpoena which was issued by this Court yesterday to the Times Mirror Company we believe raises a question of landmark importance. In our view enforcement of this subpoena would be a body-blow to a free press, but we are not here today to argue the merits of the subpoena. The reason we are here is that we believe that a brief additional amount of time is required for the briefing and argument of the motion to quash the subpoena

which we plan to file. As reflected in the motion for extension which we filed today and which has been hand-served on all of the parties we suggest that the appropriate course for the Court to follow is at this time to extend the return date of the subpoena until further order of the Court to require that any motions to quash the subpoenas be filed next Wednesday, December 20th; that oppositions be filed the following day, December 21st, and the Court hear oral argument on December 22nd, which would enable the Court to render its decision before Christmas.

We note in this connection that we have held this request for time to what we regard to be an absolute minimum and we would call the Court's attention to the fact that at its December 4th hearing it granted Mr. Bittman, counsel for defendant Hunt, a week to file memorandum on this subject. We note that that memorandum, argued very superficial, does not address what we believe to be the central and serious First Amendment questions here.

In our view, under the Branzburg decisions it is very narrowly limited in that what it dealt with were obviously situations of grand jury subpoenas issued by the prosecution. And this is not a case like that. In this case is a subpoena requested by defense counsel for purposes of impeachment.

If one examines Mr. Justice Powell's concurring --

THE COURT: --Just a moment. Do you take the position that if the primary purpose of the issuance of the subpoena is

to gain access or the opportunity to view or to examine certain documents, papers or articles for the purpose of impeachment where the source of the information is known, we don't have a case here where somebody is trying to find out who told the paper certain things, that has been disclosed. Do you say it is the law that a Court cannot order a newspaper or their reporters to produce that evidence if it is sought for the purpose, primary purpose of ascertaining whether or not there are any statements in there which might be inconsistent with the published story or statement of Mr. Baldwin? Is that your contention?

MR. DYK: That is our contention, Your Honor.

THE COURT: I just wanted to hear what your contention is. All right.

MR. DYK: As we point out, Your Honor, this is a developing area of the law, there have been very few decisions. There is the Branzburg case which I mentioned involved grand jury subpoenas and there have been a couple of cases following Branzburg which involved that.

As I was going to suggest, Mr. Justice Powell's concurring opinion which was necessary to the majority in the Branzburg case's 5 to 4 decision, he indicated even in the grand jury area would be instances in which the important First Amendment issues interest at stake would outweigh those of the grand jury disclosure and he suggested even in that grand jury area the cases would

have to be decided on a case-by-case basis.

Recently there have been two decisions which we found so far --we haven't completed our research-- two decisions of United States Courts of Appeals which have held that the Branzburg decision goes no further than that. One is the decision in the Cervantes vs Time, Inc., 464 F.2d 989, decided July 20th of this year, and the other very recent case we attached to our motion, the Baker case in the Second Circuit. And the Baker case says specifically, and I quote from page 846:

"The federal law does not require disclosure of confidential sources in each and every case, both civil and criminal, in which issue is raised."

THE COURT: They are not asking for confidential source.

MR. DYK: Yes, Your Honor, but we believe that what they are seeking here is nonetheless confidential information whose disclosure would be very injurious to the news gathering function.

When Mr. Ostrow and Mr. Nelson obtained the opportunity to interview Mr. Baldwin they were only able to do that when they expressly promised they would hold confidential --expressly promised to hold confidential any information which Mr. Baldwin did not wish disclosed.

THE COURT: Let's assume for the purpose of argument, and this is not to be discussed at length today because your

motion is for continuance, but you are fully aware of the points of law that will be discussed, you sat here recently during the first pretrial conference and you heard this matter discussed pro and con by the attorneys so that this isn't any surprise to you or your client.

MR. DYK: Well, the request for the subpoena is not a surprise, the precise question of the grounds that the defense was asserting wasn't apparent to us till they filed their memorandum this last Monday and I must say it wasn't at all clear to us Your Honor was going to grant that request because in view of the long delay after October 25 we thought maybe the parties thought better of it, and when you requested memoranda at your December 4th hearing we were not at all clear there was going to be a subpoena.

THE COURT: I am not going to decide the issue now, simply discuss the matter so you will be prepared. You are familiar with the most recent case, that is, the Branzburg case, right?

MR. DYK: Yes. As Your Honor suggests, we aren't here to argue the merits today, what we are saying is that under the Bowman Dairy and Carter cases it is apparent that the purpose of defense counsel to use the subpoena for discovery purposes is not a permissible purpose under the federal rules.

THE COURT: That isn't what I heard them say. I heard them say in effect, or substance, the principal reason he wants

this material or access to it is to ascertain whether or not there are any statements in there, comments which could be interpreted by a jury --may not have mentioned a jury-- be be inconsistent with what this witness will probably testify to on the stand. That is your position, isn't it, Mr. Bittman?

MR. BITTMAN: That is exactly our position, Your Honor. It was articulated in oral argument on two occasions and also the recent memorandum that was filed.

THE COURT: I think it is only necessary to address ourselves to that point.

MR. DYK: As I was about to say, that is the only conceivable legitimate purpose of the subpoena and we suggest that purpose to the extent that it is legitimate can be fully served by requiring return date of the subpoena no earlier than the time which Mr. Baldwin testifies. That would be the normal course contemplated by Rule 17.

The only reason as I understand from papers filed that the subpoena had been issued at this time is to enable this Court to hear arguments on our motion to quash in advance of the trial and reach its decision before that time. And we understand that desire of the Court and we are happy to meet that schedule, but we are only asking for, I believe it is three or four additional working days --three days, to prepare our arguments, and under the circumstances because there is the necessity of gathering

affidavits from different parts of the country, we believe that is a very modest and very reasonable request and hope Your Honor will grant it.

THE COURT: Mr. Miller.

MR. MILLER: If the Court please, my name is Herbert J. Miller, Jr. I have just a short time ago entered my appearance on behalf of Ronald Ostrow and Jack Nelson.

I rise in support of the motion, if the Court please. The additional time really is necessary. The complexities of the issues, at least to me a newcomer into this case, are something that I would like to have an opportunity to study. To me it is again the Court will be called upon to weigh the problems under the First Amendment with the problems of one charged with the crime, and I believe that by the time we have had an opportunity to review this that there will be a way to satisfy the requirements of both the First Amendment and the right to a fair trial which of course the defendant has.

I, as I say I am new in this case, I have not really had an opportunity to examine the facts and it may very well be that depending on what position is taken by the newspaper in this matter I am not sure my interests or interests of my clients will coincide with that of the newspaper, so I respectfully request that we be granted the additional time if the Court please, and no further adjournments will be requested by me, and it will

give me an opportunity to adequately present the case and hopefully reduce the time it takes Your Honor to make a decision.

THE COURT: All right.

MR. BITTMAN: Your Honor, certainly with respect to their request for time is discretionary with Your Honor. The Los Angeles Times has been on notice at least since October 25, 1972 with respect to the issuance of this subpoena.

Your Honor indicated from the bench on October 25th that you would approve the issuance of that subpoena for the reasons stated by me at that time. Almost simultaneously with my motion and Your Honor's statement from the bench the Los Angeles Times indicated that it intended to appeal this through all the courts. That has been their stated position, and I might add is still their stated position that they intend to litigate this to the Supreme Court if necessary, if their attorneys were correctly quoted in this morning's paper. Therefore, I think this matter should be handled expeditiously as possible.

The one conflict I do have, Your Honor, and that is I will be out of town on December 22nd so if Your Honor feels there should be a continuance I would respectfully ask that the hearing on this matter and oral argument take place December 21st as opposed to December 22nd.

THE COURT: In view of the fact the trial date is not far away, namely, January 8th, and that the Court believes that

the parties in this case --you, Mr. Bittman, and counsel for the paper, and also Mr. Miller's clients-- have had an opportunity to become acquainted with the legal issues, I see no reason why this motion should be granted. The motion will be denied.

\* \* \* (2:20 p.m.)

CERTIFICATE

It is certified the foregoing is the official transcript of proceedings indicated.

*Nicholas Sokal*  
NICHOLAS SOKAL  
Official Reporter